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In The

Supreme Court of the United States

LESLIE J. JENSEN, DAVID KADLEC, ROBERT A. KRUPPSTADT, RANDALL E. MILLER, RICHARD E. MROCH, CARL J. WARNEKE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioners faced a RICO and RICO conspiracy indictment that included twelve state law murder conspiracies as racketeering acts. In part, then, this RICO prosecution rested on conspiracies, not otherwise illegal under federal law, that resulted in no violence.

Is an inchoate state crime of conspiracy an "act or threat involving murder" under 18 U.S.C. § 1961(1)(A)? This issue concerns all petitioners.

2. Petitioners faced trial jointly. One petitioner, Leslie Jensen, elected to rest when the prosecution did, and timely requested a jury instruction closing all evidence as to him. The trial court refused. A co-defendant then introduced evidence inculpating Jensen, which the jury was allowed to consider in convicting him.

Did permitting a co-defendant's evidence incriminating Jensen after both the government and Jensen rested allow the government to avoid its exclusive burden of proof, denying due process and a fair trial under the Fifth and Sixth Amendments? This issue concerns only petitioner Leslie J. Jensen.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix A to this petition and is reported at 310 F.3d 542, as amended.

The pertinent opinion of the United States District Court for the Eastern District of Wisconsin appears at Appendix B to the petition and is unpublished. Two other decisions of the district court, addressing issues that this petition does not raise, are reported at 27 F. Supp.2d 1121 and 52 F. Supp.2d 954. Petitioners omit those decisions from the appendix.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit decided petitioners' case on November 12, 2002, and amended its decision on January 10, 2003. Some, but not all, petitioners filed petitions for rehearing in the court of appeals. The court of appeals denied those petitions for rehearing on January 10, 2003.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> . . . nor be deprived of life, liberty, or property, without due process of law; . . . .

The Sixth Amendment to the United States Constitution provides in full:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1961(1)(A) provides in full:

> As used in this chapter –
>
> (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; . . . .

STATEMENT OF THE CASE

Petitioners. This case arises from a federal prosecution of 17 members of the Outlaws Motorcycle Club in the Eastern District of Wisconsin. Only 16 of the defendants ever appeared. The seventeenth remains a fugitive. All defendants faced a substantive charge under the Racketeering Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1962(c), and a RICO conspiracy charge, 18 U.S.C. § 1962(d). Various defendants also faced other charges not relevant here.

Six guilty pleas left ten defendants facing trial. Another pled guilty during trial. Nine went to verdict and were convicted. Eight of those appealed and six are petitioners here: Jensen, Kadlec, Kruppstadt, Miller, Mroch, and Warneke.

In the end, the jury convicted all six petitioners who completed trial. The district court sentenced three to life without parole (Kadlec, Miller, and Warneke). The others received terms of years ranging from 24 years (Kruppstadt and Mroch) to 30 years (Jensen).

Proceedings Below. The first count of the superseding indictment on which petitioners went to trial charged all of them with a substantive RICO offense. The second count charged all with RICO conspiracy. Of the 34 racketeering acts common to both counts, 12 rested on state conspiracy statutes, in whole or in part.

1. Before trial, petitioners filed motions to strike all racketeering acts involving conspiracies from Counts 1 and 2 (R496), to strike acts of conspiracy from the RICO conspiracy, Count 2 (R497), and alternatively, for an order requiring the government to elect one racketeering act

involving conspiracy (R498). Those motions raised the issue in the first question presented here. The petitioners argued that state law conspiracies are not "act[s]" or "threat[s]" involving murder, within the meaning of 18 U.S.C. § 1961(1)(A), because they are inchoate offenses well outside the usual realm of federal law enforcement that neither the statute's express terms nor the legislative history suggest Congress meant RICO to reach (R500).

A magistrate judge recommended denying the motions (R720:15-31). Over petitioners' objections, the district court adopted that recommendation (R886:2-12).

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed. The court of appeals concluded that state law conspiracies are "act[s] or threat involving murder," within the meaning of 18 U.S.C. § 1961(1)(A). 310 F.3d 542, 546-47 (Appendix C).

2. At trial, the government rested on May 4, 2000 (R1878:3860). Petitioner Jensen rested immediately without presenting any evidence (R1878:3860-61). When he did, his lawyer requested that the court instruct the jury that all of the evidence against Jensen was closed, and that the jurors could not consider subsequent evidence offered by another defendant or by the government against Jensen (R1878:3860-61; R1449:Rostron's Requested Interim Limiting Instruction No. 7; R1456). The district court declined (R1878:3861).

Afterward, some co-defendants presented a defense case. One adduced testimony that bore on Jensen. First, on direct examination of the case agent, DeValkenaere, counsel for petitioner Kevin O'Neill suggested that Jensen "had a police officer that worked at Rockford P.D." so the Rockford police found out about the Outlaws targeting

Hells Henchmen within a couple days after a charged murder (R1882:4661).

O'Neill's counsel also called Timothy Voltz as a witness. Voltz was president of the Outcasts Motorcycle Club (R1886:4942). He knew O'Neill and had purchased two motorcycles from O'Neill (R1886:4943-44, 4955). Voltz testified that O'Neill had played the role of peacemaker between the Outcasts and another sober club (R1886:4945). That opened a line of government cross-examination establishing that Voltz also knew Jensen (R1886:4966) and that ARM was the club for which O'Neill had intervened as peacemaker in a spat with the Outcasts (R1886:4966-68, 4974). Over objection (R1886:4973-74), the court then permitted the government to play portions of a tape that included O'Neill talking to Voltz about Jensen (R1886:4980-83). In that conversation, O'Neill revealed some familiarity with Jensen. Voltz made clear that Jensen was not his "favorite person in life" and that he "could care less what Jack [Jensen] was gonna do" (R1886:4981).

Last, on government rebuttal, again O'Neill's counsel explored a line of questioning while cross-examining DeValkenaere (whom the government had recalled) that trenched on Jensen's interests. Jensen's counsel objected twice that O'Neill's lawyer was violating a stipulation among counsel (R1890:5139, 5140). The second time concerned a question about "new clubs in the western part of the state," (R1890:5140), which government counsel correctly understood related to Jensen (*see* R1890:5142). O'Neill's lawyer eventually withdrew that question (R1890:5145-46).

On appeal, the court of appeals did not address this issue. The parties had briefed it fully.

REASONS FOR GRANTING THE WRIT

I. State Conspiracies are not Acts or Threats Involving Murder.

A. Introduction. This issue concerns all petitioners. As defined under RICO, "racketeering activity" means "any act or threat involving murder," and so forth. 18 U.S.C. § 1961(1)(A). All of the first 12 racketeering acts that alleged conspiracy described murder as the object, and thus fell within § 1961(1)(A) if they were racketeering acts at all.

This Court has not decided whether a conspiracy with murder as an object may be an "act or threat involving murder," bringing such a conspiracy (in violation of state law) within the definition of "racketeering activity" under § 1961(1)(A). Four circuits, including the court below, have held that conspiracies to commit state law crimes identified in § 1961(1)(A) themselves may be racketeering acts within the meaning of that subsection. *United States v. Warneke*, 310 F.3d 542, 546-47 (7th Cir. 2002) (this case below); *United States v. Ruggiero*, 726 F.2d 913, 918-20 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. Licavoli*, 725 F.2d 1040, 1044-45 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984); *United States v. Welch*, 656 F.2d 1039, 1063 n.32 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *United States v. Manzella*, 782 F.2d 533, 537-38 (5th Cir.), *cert. denied*, 476 U.S. 1123 (1986); *see also United States v. Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982) (per curiam), *cert. denied*, 459 U.S. 1206 (1983)

(concerning § 1961(1)(B)). The reasoning of the courts of appeals in allowing state conspiracies as racketeering acts under § 1961(1)(A) is fairly debatable at several important spots.

B. Legislative History Advises Against It. RICO was a long time in the works. Its roots precede the Katzenbach Commission, which issued its report in 1967 after two years of study. President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967). RICO's germination arguably came with the 1951 final report of Senator Estes Kefauver's Special Committee to Investigate Organized Crime in Interstate Commerce, S. Rep. No. 725, 82d Cong., 1st Sess. (1951). An ABA Antitrust Section study and the National Commission on Reform of Federal Criminal Laws (the Brown Commission), which worked from 1967 to 1969, also influenced the eventual legislation. *See* Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 840-41 (1980).

Coupling or uncoupling conspiracies from racketeering may stretch back even earlier. This Court noted very recently that a draft of the 1934 Anti-Racketeering Act, which is a direct ancestor of the Hobbs Act, defined racketeering explicitly as organized conspiracies to commit crimes of extortion or coercion, or attempts to extort or coerce. *Scheidler v. National Organization for Women, Inc.*, 123 S. Ct. 1057, 1066 n.11 (2003).

Although the Katzenbach Commission never proposed a new substantive federal offense to address organized crime, it led to congressional efforts in that vein. Versions of the bill that became RICO appeared as early as 1965,

when Senator McClellan introduced a proposal that would have made it a federal crime to be a member of the Mafia, or of other criminal syndicates. S. 2187, 89th Cong., 1st Sess., 111 Cong. Rec. 14,680 (1965). Many raised questions about the bill's constitutionality, including the Attorney General, who criticized it on First and Fifth Amendment grounds. Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 32 (1966); *see also Lanzetta v. New Jersey,* 306 U.S. 451 (1939) (state crime of being "known to be a member of any gang" violates due process on vagueness grounds). By 1969, when he introduced S. 1861, § 2(a), 91st Cong., 1st Sess., 115 Cong. Rec. 9,568 (1969) (which became title IX of the Organized Crime Control Act of 1969, and RICO in 1970), Senator McClellan had narrowed the bill to focus on conduct, not on status. Even Professor Michael Goldsmith, one of RICO's supporters, has acknowledged this tightening of scope in explaining the legislative history. *See* Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 776-86 & 783 n.70 (1988).

The Second, Fifth, Sixth and Seventh Circuits shrugged off an important signal of Congressional intent. Two earlier drafts of the bill that became RICO expressly included conspiracies within the ambit of racketeering acts, but the enacted law does not. *See* S. 2049, 90th Cong., 1st Sess., 113 Cong. Rec. 18,007 (1967) (under definition of "criminal activity" that resembled present § 1961(1), "any conspiracy to commit any of the foregoing offenses" explicitly would have been included); S. 1861, § 2(a), 91st Cong., 1st Sess., 115 Cong. Rec. 9,568 (1969) (this immediate precursor of S. 30, which in turn became RICO, changed "criminal activity" to the present "racketeering activity;"

the analog to present subsection (A) covered "any act involving the danger of violence" to life, limb or property; a subsection (C) then continued to include "any conspiracy to commit any of the foregoing offenses"). Not only did Congress strike the conspiracy references to crimes covered under present subsections (A) and (B), then, it also trimmed back the expansive wording of subsection (A) that § 2(a) of Senator John L. McClellan's bill, S. 1861, would have provided.

Significantly, the change in wording from "any act involving the danger of violence" to the enacted version of "any act or threat" came at the Justice Department's urging, with the Attorney General asserting that Senator McClellan's definition was "too broad and would result in a large number of unintended applications as well as tending toward a complete federalization of criminal justice." Senate Comm. on the Judiciary, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 121-22 (1969) (letter from Kleindienst to McClellan). More recently, the Organized Crime and Racketeering Section of the United States Department of Justice has written, " . . . the use of these predicate offenses [attempts, conspiracies, and solicitations] is not encouraged, and will not be approved in every case." RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS at 11 (3d rev. ed. September, 1990).

So, while the leading congressional proponents of legislation tailored to organized crime, Senator Roman Hruska (S. 2049) and Senator McClellan (S. 1861), sought to include conspiracies within the field of predicate acts, Congress rejected both entreaties. The Senate further

narrowed § 1961(1)(A) at the behest of the Justice Department, for fear it was too broad.

Not all of the signs of legislative intent were the Senate's, either. The final House Report on RICO (favorably reporting it out of committee) also suggested an implicit intent to limit racketeering acts to completed crimes, at least as to subsection (A). The first reference to the definition of racketeering activity said simply, " 'Racketeering activity' is defined in terms of specific State and Federal criminal statutes." H. Rep. No. 91-1549, 91st Cong., 2d Sess. (Sept. 30, 1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4010. That hardly bespoke a purpose to include peripheral state statutes relating generally to inchoate offenses.

Later in the same report, the House Judiciary Committee summarized the definitions in § 1961(1):

> Subsection (1) defines "racketeering activity" to include murder, kidnaping, gambling, arson, robbery, bribery, extortion, narcotic violations, counterfeiting, usury, mail, bankruptcy, wire and securities fraud, and obstruction of justice. State offenses are included by generic designation. Federal offenses are included by specific reference.

H. Rep. No. 91-1549, *reprinted in* 1970 U.S.C.C.A.N. at 4032. Clearly, then, the committee referred to completed offenses. The report included murder, kidnaping, and the other named crimes. But in a plainly worded summary, the report nowhere even suggested their inchoate forerunners.

C. Distortion of the Usual Meanings of the Terms Congress Chose. The plain meaning of "act or threat" obviously is different than "offense." The former

concerns conduct, with an active connotation; the latter describes instead a legal category, relating to things punishable. A conspiracy surely is an "offense" under various provisions of federal law, but a conspiracy is not so clearly an act or threat, in either the ordinary or the legal sense.

A natural reading of § 1961(1)(A), and one that the legislative history supports, would have that subsection assuring that all substantive state law offenses broadly falling under the generic labels listed there (murder, kidnaping, and so on) will be included as racketeering acts, provided that they are felonies under state law. A liberal construction then embraces all possible substantive crimes within the generic categories. Congress in fact did intend the categories to be generic. *United States v. Garner,* 837 F.2d 1404, 1418 (7th Cir. 1987); *see also* 1970 U.S.C.C.A.N. at 4032. Thus, violation of an Illinois official misconduct statute is an "act . . . involving" bribery, even though the Illinois statute is not specifically denominated a bribery law. *Garner*, 837 F.2d at 1417-19.

The phrase "act or threat involving" is an obvious complement to the generic labels for the crimes that follow. That phrase brings within subsection (A) a wide range of substantive state crimes, so long as the acts generically are among those listed. At the same time, this construction does no violence to the plain meaning of "act" or "threat" by sweeping up inchoate offenses of the mind that are neither acts nor threats; by contrast, that is the vice of the Second, Fifth, Sixth, Seventh and Ninth Circuits' construction. The common inchoate offenses (conspiracy, solicitation, and attempt) are well known and Congress easily could have said that it wished those included under subsection (A) if it did, without much more encumbering an already

cumbersome provision. Instead, Congress seemed interested in the substantive crimes that are typical of racketeers.

A comparison of § 1961(1)(A) to § 1961(1)(B) yields no convincing reason to include state law conspiracies within the ambit of the former. True, conspiring is one way to violate the Hobbs Act, and the Hobbs Act in turn is in the list of federal statutes included in § 1961(1)(B). Therefore, a conspiracy that violates the Hobbs Act apparently is an "act which is indictable" under that statute, and so a racketeering act under § 1961(1)(B). While a conspiracy surely "is indictable" under § 1951, and thus covered by § 1961(1)(B), still a conspiracy itself is not necessarily an "act or threat involving" murder, kidnaping, or any of the other very tangible state law substantive offenses listed in § 1961(1)(A). The act of agreement "involves" the agreement and nothing more, unless and until its objects are undertaken. Congress chose a distinctly different verb in subsection (A) than it did in subsections (B) and (C), and the difference must mean something, particularly recalling the explicit reference to conspiracies that Congress struck from subsection (A).

There is an interesting omission from the list of 72 statutes in Title 18 set forth in § 1961(1)(B) as defining racketeering activity. That is § 371, the general conspiracy statute. Had Congress intended conspiracies to be racketeering acts in general, that would have been an obvious statute to include in the list. In the context of RICO, Congress has used the word "conspiracy" when it intends to include such agreements. *See, e.g.,* 18 U.S.C. § 1959(a) (expressly including conspiracies, and separating a conspiracy from "threaten[ing]" to commit specified violent acts); § 1959(a)(4) (covering "threatening," but not conspiracies;

§ 1959(a)(5), (6) (covering attempting or conspiring to commit specific violent acts).

Next, the proposition that a federal compound crime like RICO includes federal conspiracy "offenses," which § 1961(1)(D) uses with narrowly specified federal crimes as objects, does not lead inevitably to the conclusion that varying state law conspiracies "involving" a broad array of generically defined state offenses also must be included as "act[s]" or "threat[s]." Section 1961(1)(D) uses a notably different word – "offenses" – than does subsection (A), and relates to a short list of federal statutes. Section 1961(1)(A) instead describes more generically conduct that ordinarily invokes state law, and limits itself to acts and threats.

Indeed, subsection (D) would be largely redundant of subsection (A) if "act or threat" embraced conspiracies as "offense" does. Crimes involving drugs under § 102 of the Controlled Substances Act are included in subsection (A)'s list, just as they are included in subsection (D)'s short list; if conspiracies involving those controlled substances crimes already were made racketeering acts by subsection (A), there would have been little reason to include controlled substances crimes again under subsection (D).

D. Lenity. Finally, this Court recently made clear that the rule of lenity continues to play a role in understanding RICO. If there are two rational readings of that statute, one harsher than the other, this Court will choose the harsher one only when Congress spoke in clear and definite language. *Scheidler*, 123 S. Ct. at 1068. Congress did not do that in § 1961(a)(1)(A). That alone is reason to adopt the narrower, less harsh, construction. *See also Scheidler*, 123 S. Ct. at 1069 (Ginsburg, J., concurring)

("The Court is rightly reluctant, as I see it, to extend RICO's domain further by endorsing the expansive definition of 'extortion' adopted by the Seventh Circuit").

II. The Fifth Amendment and Sixth Amendment Disallow a Co-Defendant Supplementing the Government's Case Against a Defendant Who Relied on the Government's Failure to Meet Its Burden of Proof and Rested Immediately After the Prosecution.

A. Introduction. This issue concerns only petitioner Jensen. Although Jensen preserved this issue in the district court and the parties briefed it fully on appeal, the court of appeals did not address it.

B. Due Process and Fair Trial Denial: A Co-Defendant Supplementing the Government's Proof Against a Resting Defendant. A defendant may insist that the evidence against him is closed when the government rests, if he chooses to offer no defense, and that the jurors know that evidence of his guilt is closed. That proposition is self-evident in a system built on the principle that the prosecution, and no other party, shoulders the burden of proving guilt in a criminal case. *Cool v. United States*, 409 U.S. 100, 103-04 (1972) (per curiam).

But in a multiple defendant trial, what happens when the government rests, Defendant *A* rests, and then Defendant *B* for his own reasons (that *A* is helpless to reject or foreclose) chooses to offer still more incriminating evidence against Defendant *A*? If the joint jury can consider this evidence against Defendant *A*, then by accident of a joint trial he faces two prosecutors as a practical matter, not

one, and more importantly the government sheds in part its exclusive burden of proof. Cannot Defendant *A* at least insist upon an instruction that limits the jury's consideration of incriminating (or exculpating) evidence to that which the government offered, again assuming Defendant *A* rested without offering a case?

1. The answer must be yes. However, cases hold only that an appellate court will gauge the sufficiency of the evidence against a non-testifying defendant without considering inculpatory evidence offered by co-defendants (in some circuits, even if the non-testifying defendant cross-examines the co-defendant who inculpates him in the defense case). *See United States v. Thomas,* 987 F.2d 697, 702-03 (11th Cir. 1993); *United States v. Johnson,* 952 F.2d 1407, 1408 (D.C. Cir. 1992); *United States v. Belt,* 574 F.2d 1234, 1236-37 (5th Cir. 1978); *Franklin v. United States,* 330 F.2d 205, 208 (D.C. Cir. 1964); Fed. R. Crim. P. 29(a).

Still, the analogy is tight. An appellate court must be able to look at no more and no less evidence than can the jury in assessing whether the proof supports a conviction. If the rule were otherwise, it would make no sense for an appellate court to ask what a reasonable jury might have done, viewing the evidence in the light most favorable to the government. Jury and appellate court would be looking at different bodies of evidence, so the latter could not fairly assess what the former might have found rationally.

What these cases suggest necessarily is that the only evidence rightly counted in assessing guilt is the government's proof before it rests, assuming the defendant in turn rests without presenting evidence. That is an intuitively correct, and beguilingly simple, rule. In a criminal case, the sovereign is the only plaintiff. It alone bears the

burden of proof. Just as the Fifth Amendment assures that the government must rely on its own labors at trial – it cannot compel the defendant to incriminate himself by testimonial word or act – so the very structure of an American trial assures that the sovereign enlists no second prosecutorial party after it rests. The accused is not double-teamed.

From another perspective, even when a defendant stands trial in company of co-defendants because that is a permissible economy, *see* FED. R. CRIM. P. 8(b), 14, he rightly faces but one prosecuting party. The sovereign has no legitimate interest in relying upon other parties to supplement its proof against a defendant simply by fortuity of trying two or more defendants together. As to each individual defendant, the government bears the same burden whether the trial is against that defendant solely or against many: to prove the charge beyond a reasonable doubt. If in effect a co-defendant becomes a second prosecutor in a joint trial after the government rests, then necessarily the government's constitutional burden has been lightened improperly.

From either angle, due process leaves no room for a second prosecutor after the sovereign and the defendant rest. So this Court should construe the Fifth Amendment and the Sixth Amendment, the provisions of which assure fair criminal trials.

2. Importantly, this is a different problem than the antagonistic defenses that the accused must risk in a joint trial, *see Zafiro v. United States*, 506 U.S. 534, 539-40 (1993), although the difference is subtle. When a defendant asserts his innocence, even if to the exclusion of his co-defendant's, primarily he defends himself. If that

defense runs contrary to another's defense, so be it; there may be cause for discretionary severance even under *Zafiro*, but it is not the concern petitioner Jensen raises. A defendant particularly must run the risk of antagonistic defenses during the government's case-in-chief, when a co-defendant's cross-examination may spill incidentally on other defendants.

Only after both government and the first defendant rest, when a second defendant offers evidence that incriminates his co-defendant, does the problem petitioner Jensen now identifies arise. In that instance, functionally the offering defendant works as a second prosecutor. This is petitioner Jensen's complaint, and the structural flaw he sought to avoid (or at least to help cure) by the interim instruction he requested.

The district court rejected his request. The harm then occurred.

CONCLUSION

Six petitioners pray that the Court grant a writ of certiorari and set the case for briefing and plenary consideration.

Respectfully submitted,

LESLIE J. JENSEN, *et al.*, *Petitioners*

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EASTERN WISCONSIN, INC.

MARCH 2003

APPENDIX A

310 F.3d 542

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Carl J. WARNEKE, David Kadlec, Leslie J. Jensen, Robert A. Kruppstadt, Randall E. Miller, Richard E. Mroch, Kevin P. O'Neill, Harvey E. Powers, and James W. Schneider, Defendants-Appellants.

Nos. 00-3719, 00-3720, 00-3721, 00-3731, 00-3740, 00-3865, 00-4344, 00-4345 and 01-1683.

Argued Oct. 17, 2002.
Decided Nov. 12, 2002.
As Amended on Denial of Rehearing and Rehearing En Banc Jan. 10, 2003.

Eric J. Klumb (argued), Steven M. Biskupic, Scott James Campbell (argued), Carol L. Kraft, Office of U.S. Atty., Milwaukee, WI, for U.S.

Thomas L. Shriner, Jr., Thomas G. Wilmouth (argued), Foley & Lardner, Milwaukee, WI, for Carl J. Warneke.

Kent R. Carlson, Thomas G. Wilmouth (argued), Chicago, IL, for David Kadlec.

Dean A. Strang, Thomas G. Wilmouth (argued), Federal Defender Services of Eastern Wisconsin, Inc., Milwaukee, WI, for Leslie J. Jensen.

Morris D., Berman, Thomas G. Wilmouth (argued), Madison, WI, for Robert A. Kruppstadt.

Jack J. Crowe, Thomas G. Wilmouth (argued), Winston & Strawn, Chicago, IL, for Randall E. Miller.

Thomas G. Wilmouth (argued), Milwaukee, WI, for Richard E. Mroch.

Thomas Peters (argued), Murphy, Peters & Davis, Chicago, IL, for Kevin P. O'Neill.

George F. Taseff, Richard H. Parsons (argued), Office of Federal Public Defender, Peoria, IL, for Harvey E. Powers.

William H. Theis (argued), Office of Federal Defender Program, Chicago, IL, for James W. Schneider.

Before EASTERBROOK, MANION, and KANNE, Circuit Judges.

EASTERBROOK, Circuit Judge.

Warfare broke out between the Outlaws and Hell's Angels motorcycle gangs during the 1990s when the Angels began to establish a presence in the Midwest by absorbing the Hell's Henchmen, another motorcycle "club." The conflict seems to have been more about control of criminal activities (such as drug sales) than about divergent methods of motorcycle maintenance or incompatible bikes (both groups favor Harleys). The record in this criminal prosecution establishes that members of the Outlaws used murderous force to ward off the threat, and the Angels replied in kind. Outlaws preferred sneak attacks (using bombs) to open ones but were not averse to other weapons. The Outlaws acquired and used at least one AK-47 assault rifle, along with many other guns. An elderly couple with no connections to either group is among the dead, and three police officers were injured when a bomb exploded as it was being dismantled.

A grand jury charged that the Outlaws were a criminal "enterprise" that the nine defendants operated

through a pattern of racketeering (including shootings, bombings, robbery, drug sales, and passing counterfeit money), violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68. James Schneider pleaded guilty and was sentenced to 45 years in prison. The other eight went to trial and were convicted. Five of the eight were sentenced to life imprisonment; the rest received long terms of years. The evidence against each of these eight is overwhelming, and we do not discuss individual challenges to its sufficiency. Nor does the defendants' complaint about trying seven of them together (a last-minute problem with counsel led the judge to give Harvey Powers a separate trial) require analysis beyond a citation to *Zafiro v. United States,* 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993), and the observation that the judge did not abuse his discretion.

Considerable evidence came from transmitters inside lamps in the homes of Outlaws Kevin O'Neill and David Wolf. A warrant authorized agents to hear and record the communications. Nonetheless, defendants contend, the evidence should have been suppressed because not only installation of the bugs but also a determination that one was functional preceded issuance of the warrant – and the judge was not told that these things had occurred.

The installation of the bugs did not violate the fourth amendment: the Constitution does not protect criminals against the risk that their associates will assist the police. See *Hoffa v. United States,* 385 U.S. 293, 300-03, 310-12, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Placement of these microphones was the result of good police work plus luck. The informant was Patricia Wolf, David's wife, who set up two lamps, one containing a microphone. Visiting the Wolf home, O'Neill said that he liked the lamps. Patricia then

swapped the inactive lamp for a second bugged lamp. When O'Neill repeated his admiration of the lamps and asked if he could have one, Patricia graciously assented. O'Neill took one of the lamps (it did not matter which) and thus bugged his own home. But he didn't plug it in, and without electricity it was useless. So Patricia Wolf paid O'Neill's girlfriend a friendly visit and helped her improve the lighting in O'Neill's office. Agents drove by O'Neill's residence to find out if this worked; they learned from detecting a carrier signal that it had. Whether this step created a constitutional problem under the holding of *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), is not a question we need decide, because no evidence based on the monitored signal was used against O'Neill at trial. What *was* used was the ensuing conversations, and their interception was authorized by a warrant issued in response to an affidavit that did not mention the monitored signal (or for that matter the fact that the bug-infested lamp was in place already). Because the agents did not intercept (*i.e.,* did not either record or listen to) any communications until after the warrant had issued, installation of the device at O'Neill's home (and determination that it was working) did not violate statutory limits on eavesdropping; until interception begins, a bug is nothing but a "tracking device" under 18 U.S.C. § 3117(b). See also 18 U.S.C. § 2510(12).

We may suppose (without deciding) that when seeking authorization to listen to conversations the agents should have told the judge that the lamps were already in place, but this does not matter. It is not conceivable that the judge would have said anything like: "Because you used an informant to install one microphone and tricked O'Neill into bugging his own home, I will deny you permission to

listen even though you have established probable cause to believe that the bugs will reveal evidence of crime." Cf. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Perhaps the judge would not have authorized clandestine entry had he realized that bugs already were in place. Prosecutors say that they sought authority to enter in case the lamps should be unplugged or not transmit signals strong enough to be recorded; the judge might have required prosecutors to show one of these problems before authorizing an entry. But in the event no entry was made. So there is no causal chain from the omission to any evidence used against the defendants, and no basis for suppression.

Defendants press several objections to their RICO convictions. One that affects all defendants is a contention that conspiracies may not be included among the predicate racketeering offenses. Defendants contend first that no inchoate offense can be "racketeering activity" as 18 U.S.C. § 1961(1)(A) defines that term, and second that use of conspiracy as a predicate is particularly inappropriate when the federal crime is a RICO conspiracy violating § 1962(d). (They also contend that there was one big underlying conspiracy, for at most one predicate offense, rather than multiple conspiracies with different criminal objects. This presented a jury question, resolved adversely to defendants at trial on the basis of ample evidence. We do not discuss this theme further.) Objections to the use of conspiracies as predicate crimes have been made in other circuits, uniformly without success. See *United States v. Ruggiero,* 726 F.2d 913, 918-20 (2d Cir.1984); *United States v. Manzella,* 782 F.2d 533, 537-38 (5th Cir.1986); *United States v. Licavoli,* 725 F.2d 1040, 1044-45 (6th Cir.1984). We agree with these decisions.

Section 1961(1)(A) defines "racketeering activity" to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year". The indictment listed 34 predicate acts of racketeering activity, some of which were (or included) conspiracies to do one or more of these things – for though the Outlaws carried out many malevolent acts, sometimes their plans went awry and only inchoate crimes could be proven. It is no stretch to describe a plot to blow up a Hell's Henchmen clubhouse (with members inside) as an "act or threat involving murder . . . which is chargeable under State law and punishable by imprisonment for more than one year". Conspiracy means agreement, and agreement is an "act" rather than just a thought. Conspiracies are illegal because of what they portend (that is, what the conspirators threaten to do). What is more, all of the state-law conspiracies listed as predicate offenses depend on proof of overt acts – concrete steps toward the substantive crime, steps that themselves qualify as predicate offenses. The prosecutor did not charge as predicate offenses any conspiracy that may be established without proof of an overt act – such as a drug conspiracy under federal law, see *United States v. Shabani,* 513 U.S. 10, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994).

There's no reason to distinguish the substantive RICO offense under § 1962(a), (b), or (c) from a RICO conspiracy under § 1962(d) when it comes to use of inchoate offenses as predicates. The definition in § 1961(1)(A) does not vary with the choice of subsection in § 1962. See *United States*

v. Neapolitan, 791 F.2d 489, 501 (7th Cir.1986). True enough, we held in *United States v. Baker,* 905 F.2d 1100 (7th Cir.1990), that a drug conspiracy may not be used as a predicate offense for purposes of the Continuing Criminal Enterprise statute, 21 U.S.C. § 848. But this was because any drug conspiracy would be a lesser included offense of the crime defined by § 848. By contrast, a conspiracy to commit murder is not a lesser included offense of the RICO crime, which is defined as operating or managing an enterprise through a pattern of racketeering activity. It is possible to manage an enterprise without killing anyone (or conspiring to do this), so using a conspiracy as a predicate offense does not entail double counting.

Powers offers a wrinkle on these arguments. He starts from the fact that § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity". In order to "conduct or participate" in the enterprise, one must have "some part in directing" its affairs. See *Reves v. Ernst & Young,* 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993); *United States v. Swan,* 250 F.3d 495, 498-99 (7th Cir.2001). Yet the conspiracy charge under § 1962(d) did not require the jury to find that Powers had directed, managed, or otherwise conducted the enterprise. Relying on *Neibel v. Trans World Assurance Co.,* 108 F.3d 1123, 1128-29 (9th Cir.1997), Powers insists that only a person who participates in an enterprise's management or operation may be guilty of conspiracy under § 1962(d). And although Powers was convicted of a substantive RICO offense, he contends that the jury instructions for this crime were incorrect so that

the jury did not necessarily find that he managed or conducted any of the Outlaws' operations.

Neibel is an unsatisfactory decision. It assumes that only a person who has committed the substantive crime can be guilty of conspiracy and then holds that this principle applies to RICO too. Yet there is no such principle. As cases such as *Standefer v. United States,* 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980), and *United States v. Pino-Perez,* 870 F.2d 1230 (7th Cir.1989) (en banc), show, one may be a conspirator or aider and abetter even if one cannot be convicted as a principal. Example: a person can conspire to distribute drugs without actually distributing drugs, indeed without ever having acquired drugs to distribute. One may commit the crime of conspiracy even though it is impossible to perform all of the acts constituting the substantive offense. See, e.g., *United States v. Feola,* 420 U.S. 671, 694, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975); *Hyde v. United States,* 225 U.S. 347, 365, 32 S.Ct. 793, 56 L.Ed. 1114 (1912). "A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense". *Salinas v. United States,* 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). But this requirement will be met whenever the conspirator joins forces with someone *else* who manages or operates the enterprise. Section 1962(d) is not limited to a conspiracy among the top dogs. So we held in *Brouwer v. Raffensperger, Hughes & Co.,* 199 F.3d 961, 967 (7th Cir.2000), and reiterated in *Swan,* 250 F.3d at 499. Nothing in *Neibel* persuades us to change course. Indeed, the ninth circuit seems not to have recognized that it was going against the Supreme Court's view of what is necessary to prove a criminal conspiracy. It claimed to be following *United States v. Antar,* 53 F.3d 568 (3d Cir.1995),

and *United States v. Quintanilla,* 2 F.3d 1469 (7th Cir.1993), but *Quintanilla* has nothing to do with this subject, and the third circuit has disavowed the passage in *Antar* to which *Neibel* referred, and disagreed with *Neibel*'s holding too. See *Smith v. Berg,* 247 F.3d 532, 536-38 (3d Cir.2001). Every other circuit that has considered this subject likewise has disapproved *Neibel.* See *United States v. Zichettello,* 208 F.3d 72, 98-99 (2d Cir.2000); *United States v. Posada-Rios,* 158 F.3d 832, 857 (5th Cir.1998). See also *United States v. Starrett,* 55 F.3d 1525, 1547 (11th Cir.1995) (a pre-*Neibel* RICO prosecution of other Outlaws in which the court held that the RICO conspiracy offense does not require proof that the defendant operated or managed the enterprise). We shall stick with *Brouwer.*

As for the jury instructions in Powers's trial concerning the substantive RICO offense: The judge told the jury that

> [a] person "conducts or participates in the conduct of the affairs of an enterprise" if that person uses his position in, or association with, the enterprise to perform acts *which are involved in some way in* the operation or management of the enterprise, directly or indirectly, or if the person causes another to do so.

According to Powers, the language we have italicized waters down the statutory requirement that the person "conduct" or "participate in" the operation or management of the enterprise. Under the instruction given, for example, a secretary who types a letter for a manager might violate § 1962(c) even though the letter had nothing to do with any predicate offense, because sending letters is "involved in some way" in the operation or management of

the business. *Reves* and *Swan* hold that to violate RICO the person must have a real operational (or managerial) role, while the italicized language sweeps up peripheral figures.

This is a good point in principle. It would be better for a district judge to use language of the kind suggested in *Swan,* or just use the statutory language. Section 1962(c) declares that it is "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through" a pattern of specified predicate acts. The phrase "directly or indirectly" already contains enough flex that the addition of phrases such as "involved in some way" may move jurors too far from the law itself. The terms in the statute are not abstruse legalisms; attempts at elaboration may not improve the accuracy of decisions. But the language the district judge used does not vitiate the conviction, because other parts of the instructions made it clear that only those who personally carry out the "pattern of racketeering activity" may be convicted. Secretaries, lamp dealers, and other peripheral figures who might be swept in by the phrase "involved in some way" are swept right out again by the racketeering-activity element. There was no risk that a harmless functionary would be convicted under the full set of instructions given to Powers's jury, and the evidence was ample to show that Powers "conducted" the affairs of his chapter of the Outlaws through a pattern of bombings, shootings, and other violence, for which he was awarded a special commendation that he wore openly, proclaiming his role as an enforcer. (Powers wore a patch bearing a skull and crossed pistons, with an "SS" insignia awarded only to members who had committed acts of violence on the

group's behalf. After becoming a full member of the Outlaws in fall 1994, and receiving the SS insignia for his role in killing LaMonte Mathias, Powers committed several additional murderous acts and participated in other criminal activities to boot.)

Defendants individually and collectively make a passel of additional arguments. Powers, for example, wanted more time so that his new lawyer could work through the voluminous record. Yet counsel had six months for this purpose – and the invaluable benefit of watching the other seven defendants' trial. That preview of the evidence and strategy was worth many additional months of preparation time. Most of the defendants complain about the limiting instructions that the judge gave. They essentially wanted the judge to remind the jury incessantly that particular evidence might have value against one defendant but not others, or might have value contingent on a finding that the defendants were co-conspirators. See *United States v. Martinez de Ortiz,* 907 F.2d 629 (7th Cir.1990) (en banc). Perhaps this could have been handled better, but too many reminders get irksome and jurors will tune them out. At the close of the case defense counsel did not ask for an instruction recapping the tasks of separation that the jurors needed to perform – but the arguments of counsel drove home the nature of the task. Each defendant's lawyer reminded the jurors (without contradiction from judge or prosecutor) that guilt must be assessed individually, using only evidence about what that defendant did or said. We could go on, saying a few words about each remaining line of argument, but the trials were well handled by the district judge and it suffices to say that we have considered these arguments and find no abuse of discretion.

The only other contentions that require individual treatment are those based on *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Seven defendants were tried before *Apprendi;* Powers was tried afterward, and in his case the jury was asked to (and did) determine beyond a reasonable doubt whether the circumstances that raised the maximum punishment to life imprisonment had been established. That approach satisfied the due process clause, even though the indictment did not include all of the details that potentially affected the sentence. See *United States v. Cotton,* 535 U.S. 625, 122 S.Ct. 1781, 1785-87, 152 L.Ed.2d 860 (2002); *United States v. Smith,* 308 F.3d 726, 739-42 (7th Cir.2002). Providentially, the district judge asked the jury to return special verdicts, one for each predicate act, even in the pre-*Apprendi* trial. For six defendants these special verdicts show that the jury found, beyond a reasonable doubt, events that justify a punishment as high as life imprisonment. With respect to these six there is no *Apprendi* problem. With respect to Carl Warneke, however, a problem remains.

The maximum penalty following a RICO conviction depends on the maximum penalty for the most serious predicate offense. For Warneke, that offense was murder committed in Illinois. Illinois authorizes life imprisonment (or capital punishment) for killing with certain aggravated circumstances, such as "exceptionally brutal or heinous behavior indicative of wanton cruelty" or premeditated murder. See 730 ILCS § 5/5-8-1(a)(1)(b). Lesser degrees of murder may have lower maximum sentences. The problem lies in Predicate Act 20, which alleged that an Outlaw murdered Jack Castle in a drive-by shooting. Act 20 included two subparts: generic conspiracy to commit

murder (Act 20A) and premeditated murder (Act 20B). The latter carries a life sentence; the former does not. The jury instructions did not call on the jurors to determine whether Act 20A or Act 20B (or both) had been committed; the special verdict referred to Act 20 as a unit. The prosecutor contended that Warneke, though not the shooter, had directed the murder and thus was accountable as a principal under Illinois law, but the jury did not find this explicitly.

But neither did the district court commit plain error in sentencing Warneke to life imprisonment. Because he did not make an *Apprendi*-like argument in the district court, and did not ask for a special verdict distinguishing Act 20A from Act 20B, only plain error could justify reversal now. See Fed.R.Crim.P. 52(b); *United States v. Bjorkman,* 270 F.3d 482 (7th Cir.2001); *United States v. Nance,* 236 F.3d 820 (7th Cir.2000). Plain error means error that not only is apparent in retrospect (as this error is) but also threatens an injustice – which this error did not. For although the jury did not *find* that Warneke was the brains behind this premeditated murder (one carried out by lying in wait), the record demonstrates this. Several witnesses testified in detail about this murder and Warneke's role in its planning. Warneke did not dispute the evidence that Castle's execution was carefully planned. Instead Warneke denied that he took part in that planning. *That* argument the jury considered, and rejected beyond a reasonable doubt, when it found that Warneke was responsible for Predicate Act 20. The important finding was made by the jury, on the right standard. So no injustice has been done; the error turns out to have been wholly formal.

Schneider has a distinct theory: because he bypassed the jury when pleading guilty, *no one* found *anything* beyond a reasonable doubt. We inquired at oral argument whether Schneider wants to withdraw his plea and go to trial, on the rationale that he would not have pleaded guilty had he known that he was giving up the right to have the jury determine beyond a reasonable doubt those circumstances that fix his maximum punishment. Counsel answered no. By pleading guilty and assisting the prosecutor, Schneider reduced his punishment. The likely result of withdrawing the plea and going to trial would be a life sentence. What Schneider wants instead is to retain the benefit of the plea while avoiding any exposure to a penalty exceeding 20 years (the "minimum maximum" for every RICO conviction). This is not an available outcome. What actually happened certainly is not plain error (the standard for Schneider, as for Warneke, because no timely argument was made in the district court). The predicate acts to which Schneider *confessed* as part of his plea expose him to life imprisonment. Schneider certainly wasn't "denied his right to a jury trial," as his reply brief says; he *waived* his right to a jury trial. His own admissions resolved all important matters against him. An admission is even better than a jury's finding beyond a reasonable doubt; it removes all contest from the case. See *United States v. Broce,* 488 U.S. 563, 570, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,
v. Case No. 97-CR-98
KEVIN P. O'NEILL, et al.,
Defendants.

ORDER
(Filed Dec. 15, 1998)

On August 28, 1998, Magistrate Judge William E. Callahan, Jr. issued a recommendation and order addressing the third round of pretrial motions ("Round III") in the above-entitled case. The third round of pretrial motions includes motions to sever defendants and motions to dismiss based upon the contents of the indictment. Pursuant to 28 U.S.C. § 636(b)(1)(A), the defendants filed objections to the magistrate's recommendation and order on or before October 14, 1998. On November 2, 1998, the government filed its response to many of the defendants' objections. The court will address the issues in the order presented by the magistrate where possible. The page numbers included in the subheadings refer to the pertinent pages in the magistrate's recommendation.

I. Rostron's Objection to 14-15

James Rostron objects to the denial of his motion to dismiss the indictment or to stay the proceedings based upon this district's Juror Selection Plan. Rostron explains

that he has previously raised this objection before another court in the Eastern District of Wisconsin and that the Seventh Circuit Court of Appeals has undertaken a review of that decision. *See United States v. Raskiewicz,* No. 97-1525 (7th Cir.). In any event, Rostron has not presented the court with a substantive objection to the magistrate's recommendation to deny the motion, leaving the court to adopt that recommendation as a matter of course. *See Banta Corp. v. Hunter Publ'g Ltd.,* 915 F. Supp. 80, 81 (E.D. Wis. 1995).

II. Rostron's Objection to 15-21

James Rostron moves the court to strike from Counts One and Two all alleged racketeering acts that are themselves conspiracies, arguing that "a mere conspiracy to murder" does not fall within the definition of "an act or threat involving murder." Defendant Rostron's Objections to Magistrate Judge's Recommendation and Order on Round III of Pretrial Motions at 3 (hereinafter "Rostron's Objections"). Rostron offers two arguments in support of his contention that conspiracy to commit murder does not fall within the ambit of "an act or threat involving murder."

First, Rostron contends that a conspiracy to commit murder does not involve any discrete acts but rather involves an agreement among individuals to pursue a specific outcome. Rostron's Objections at 4-9. When Rostron made this same argument before Magistrate Callahan, the magistrate reasoned that conspiracies necessarily involve an act of consent among the various perpetrators to pursue their common goal. Thus, the magistrate found that "such *acts* would, at a minimum, be the various

means by which those individuals manifested to one another their intention to become part of the conspiracy, such as by speaking, by a nod of the head, by a raising of the hand, or by lighting a fire and giving off a smoke signal." Recommendation and Order at 20. In his objection to the magistrate's recommendation Rostron argues that an act of assent may be an innocent and innocuous act and that "[a] nod of the head to signify assent is not plausibly an act or threat involving murder, at least at the conspiracy's inception." Rostron's Objections at 5.

The court finds that Rostron's argument directly conflicts with Congress' goal in first enacting the RICO statute. Some of the most dangerous criminal organizations seek to protect themselves from prosecution by separating their crimes into so many component acts that the acts lose meaning in light of the overall criminal enterprise:

> The crime chieftains, for example, have developed the process of "insulation" to a remarkable degree. The efficient police forces in a particular area may well be aware that a crime leader has ordered a murder, or is an important trafficker in narcotics, or controls an illegal gambling network, or extorts usurious gains from "shylocking" ventures. Convicting him of crimes, however, is usually extremely difficult and sometimes is impossible, simply because the top-ranking criminal has taken the utmost care to insulate himself from any apparent physical connection with the crime or with his having to commit it.

United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986) (citing Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, Organized Crime and Illicit Traffic in Narcotics, S. Rep.

No. 72, 89th Cong., 1st Sess. 2 (1965)). The defendant's suggestion that an agreement to participate in a conspiracy to murder does not fall within the ambit of an "act" as used in section 1961(1)(A) would have the effect of eviscerating the RICO statute. Therefore, the court rejects Rostron's labyrinthian interpretation of the RICO statute and that statute's legislative history, as "[n]o rule of construction . . . requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to fall within its scope. . . " *Salinas v. United States,* 522 U.S. 52, 118 S. Ct. 469, 475 (1997) (quoting *United States v. Raynor,* 302 U.S. 540, 552 (1938)).

The court finds that the "act" of agreement could take place even without the performance of any physical act to show that agreement. For example, a so-called "crime chieftain" could established a method of command whereby his agents request permission to commit murders which they think will benefit the organization. In such a scenario, the chieftain could participate in the conspiracy to commit murder by simply remaining silent when approached by his subordinates about a planned crime. thus implying his agreement to participate in the conspiracy. Congress has chosen not to reward such criminals for their ingenuity. Therefore, whether an individual participates in a conspiracy through silence, a nod, or some overt physical act, the government has the burden of showing that relationship. The government needs to show that the individual knowingly engaged in the act of consent in order to show the individual's participation in the conspiracy. Ultimately, the jury will have to answer the question of whether a defendant's actions constitute knowing consent to participate in a charged conspiracy. For purposes of evaluating Rostron's motion to dismiss, the court

finds that the act of consent falls within the ambit of 18 U.S.C. § 1961(A), and the court will not dismiss the RICO counts for failure to allege sufficient predicate acts.

The court's decision comports with the established law in this and in many other circuits finding that conspiracy to commit murder is "an act" involving murder and can constitute a racketeering offense within the ambit of section 1961(1). *See, e.g., United States v. Ruggiero,* 726 F.2d 913, 918-20 (2d Cir. 1984) (holding that a "conspiracy to murder in violation of [New York state law] is an 'act involving murder' and therefore may constitute 'racketeering activity' within the meaning of the RICO statute"); *United States v. Licavoli,* 725 F.2d 1040, 1044-45 (6th Cir. 1984) ("[C]onspiracy to commit murder may be a predicate act under 18 U.S.C. § 1961(1)(A) for a RICO charge."); *United States v. Welch,* 656 F.2d 1039, 1063 n.32 (5th Cir. 1982) ("The language of subsection a itself which includes 'any act or threat involving murder' appears to contemplate a conspiracy to commit murder. A conspiracy to commit murder is an act involving murder.")

Second, Rostron contends that the magistrate incorrectly considered the explicit inclusion of conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, as a predicate act for a RICO indictment within the meaning of 18 U.S.C. § 1961(B) as evidence that conspiracies may form the predicate basis for a RICO charge. Rostron's Objections at 9-12. Rostron argues that the Hobbs Act analogy does not apply because the Hobbs act appears as the 43rd statute in the list of 72 statutes contained in section 1961(B). However, the court notes that statutes listed in section 1961(B) appear in numerical order, and the court has no reason to suspect that an argument drawn from the 43rd

statute on that list should carry less weight than an argument drawn from any other statute on that list. The court agrees with the magistrate's reasoning and finds that the government correctly alleged conspiracy to commit murder as a predicate act to form the basis for the RICO charge. The inclusion of the Hobbs Act shows that Congress did not wish to create a prohibition against alleging a conspiracy as a predicate act for a RICO charge.

III. Rostron's Objection to 21-28

James Rostron objects to the magistrate's recommendation that this court deny his alternative motion to strike all of the conspiracy predicate acts except one. Rostron's Objections at 12. Defendants McVay, Meinen, and Blake jointly filed a separate objection to the magistrate's recommendation echoing concerns about the "pattern requirement" for the predicate acts which form the bases of the RICO charge. *See* Defendant's Objections to Magistrate Judge Judge [sic] Callahan's Recommendation and Order on Round III of Pretrial Motions Re: Motion to Dismiss Count One for Insufficiency [sic] to Meet Requirements of 18 U.S.C. § 1962(c) or, in the Alternative, to Strike Portions of Count I as Insufficient to Meet the Requirements of 18 U.S.C. § 1962(c) (hereinafter "McVay's Objections"). Rostron maintains that the magistrate incorrectly applied *United States v. Sertich,* 95 F.3d 520 (7th Cir. 1996), in deciding whether the indictment impermissibly charges many separate conspiracies when the actual crimes constitute one single conspiracy. Such a scheme would violate the defendant's right not to be twice (or more) tried for the same offense. *Sertich,* 95 F.3d at 523 (citing *Braverman v. United States,* 317 U.S. 49, 52-54 (1942)).

However, a careful reading of *Sertich* shows that the magistrate correctly analyzed the indictment in this case. In order to determine whether several indicted crimes constitute multiple charges for the same offense, the traditional analysis involves evaluating whether the same evidence required to prove one of the crimes would have been sufficient to prove any of the other crimes. *Sertich,* 95 F.3d at 524. In undertaking this examination, the court "must look to such factors as whether [the crimes] involve the same overt acts, people, places, or time period; whether they share similar objectives or modus operandi; or whether the [multiple] conspiracies depend upon each other for success," *Id.* (citing *United States v. Dortch,* 5 F.3d 1056, 1061 (7th Cir. 1993)). In this case, the magistrate found that "a conspiracy to murder victim 1 does not depend, for its success, upon the murders of victims 2, 3, 4, 5, etc." Recommendation and Order at 27. The court agrees with this analysis, and Rostron has not raised any arguments to refute this conclusion.

Rostron contends that he faces double jeopardy because all of the charged conspiracies fall within a 27 month time frame and some of them temporally overlap. However, the court agrees with the magistrate that the time overlap between the charged conspiracies in this case does not render the charging of multiple conspiracies improper. *Dortch,* 5 F.3d at 1062 ("[W]e do not find the alleged time overlap particularly significant."). In sum, Rostron cannot invoke the double jeopardy doctrine to protect himself because "[t]he guarantee against double jeopardy does not insulate a criminal from punishment for subsequent offenses merely because he chooses to continue committing the same type of crime." *Dortch,* 5 F.3d at 1063

(quoting *United States v. West,* 670 F.2d 675, 681 (7th Cir. 1982)).

Rostron also argues that the charged conspiracies are so disparate as to violate the continuity requirements for multiple charges brought in a RICO format. *See H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229 (1989). Defendants McVay, Meinen, and Blake echo this objection, stating that they were not properly charged with the RICO conspiracy in this case. *See* McVay's Objections at 1-2. Rostron argues that "were these dozen murder conspiracies so independent, involving different overt acts, people, places, and so forth, the alleged racketeering acts would not share the continuity and relationship that is essential to any RICO charge's pattern element." Rostron's Objections at 13. However, both Rostron and McVay failed to raise their continuity arguments before the magistrate, and may not validly raise them now on objection to the magistrate's recommendation.[1] Although both defendants couch their continuity arguments as a response to the magistrate's determination that each of the charged conspiracies represents a chargeable offense, they should have been able to identify such a fundamental defect in the indictment without reading the magistrate's recommendation and order. However, for purposes of completeness, the court will briefly evaluate Rostron and McVay's newly-raised arguments.

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[1] Defendants McVay, Meinen, and Blake did file motions to dismiss some of the counts of the indictment as it pertains to them because they were not sufficiently involved in the management and operations of the enterprise. *See* Recommendation and Order at 31-34.

The charged conspiracies contain sufficient continuity to survive the defendant's *Northwestern Bell* challenge. The Supreme Court has given the continuity requirement a broad reading in order to protect the expansive nature of the RICO statute. The Court reasoned that "[t]he limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." *Northwestern Bell,* 492 U.S. at 243. The Supreme Court further explained that "continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.* at 242-43.

Although McVay, Meinen, and Blake argue that they did not participate in a significant number of predicate acts in furtherance of the racketeering activities, these defendants acknowledge that they are charged with participating in two, four, and six predicate acts respectively. McVay's Objections at 2. Therefore, on their face the charged predicate acts fall within the statutory definition of a "pattern of racketeering activity" which requires "at least two acts of racketeering activity." 18 U.S.C. § 1961(5).

Furthermore, all of the charged conspiracies contain the common element that the crimes were committed to in some way further the perceived interests of the Outlaws of America Motorcycle Club. In many ways, this common element is the epitome of the type of unifying elements that should form the bases of a RICO charge, and the

court need not dismiss any of the charged conspiracy counts.

IV. Rostron's Objection to 28-31

James Rostron moves this court to reject the magistrate's recommendation that the court not strike the predicate acts of the conspiracy from Count Two of the indictment. Rostron contends that in order to sustain a charge of conspiracy to violate RICO, pursuant to 18 U.S.C. § 1962(d), the Government must show that a particular defendant participated in at least two of the predicate racketeering acts which form the basis of the charged racketeering activity. Rostron's Objections at 16-21. The magistrate relied on *Salinas v. United States,* 522 U.S. 52, 118 S. Ct. 469 (1997), to determine that section 1962(d) does not require such a showing.

In his objections to the recommendation, Rostron argues that the magistrate misinterpreted *Salinas* and that a correct interpretation limits the decision to require that "a defendant may be convicted on [six] a RICO conspiracy charge even though he made no criminal agreement *personally* to commit at least two racketeering acts." Rostron's Objections at 16 (emphasis in original).

Rostron's suggested interpretation directly conflicts with the plain language of *Salinas.* In *Salinas,* the Supreme Court stated that with regard to prosecutions for conspiracy to commit a RICO offense:

> "To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principals, but would render most

> prosecutions for the offense nugatory." [*Bannon v. United States,* 156 U.S. 464,] 469 [(1895)]. The RICO conspiracy statute, § 1962(d), broadened conspiracy coverage by omitting the requirement of an overt act; it did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts.

Salinas, 522 U.S. 52, 118 S. Ct. at 477. The Court continued, explaining that:

> It makes no difference that the substantive offense under subsection (c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit *or agree to commit* the two or more predicate acts requisite to the underlying offense.

Id., 118 S. Ct. at 478 (emphasis added). Thus, Rostron's assertion that he "is not wrong when he argues that each defendant in Count Two necessarily must be proven to have agreed to participate in the enterprise, and *to have agreed to the commission* of two or more predicate acts," Rostron's Objections at 16 (emphasis added) (Citation omitted), runs afoul of the Supreme Court's unanimous decision in *Salinas.* Therefore, the court need not pursue the issue further, and the court will adopt this portion of the magistrate's recommendation.

V. Meinen's Objection to 31-34

James Meinen objects to the magistrate's recommendation that the court deny his motion to strike Counts One and Two of the indictment as they relate to him because

he was not sufficiently involved in the management and operations of the enterprise. Objections to Magistrate Judge's Recommendations and Orders Regarding Round III of Defendant's Objections (hereinafter "Meinen's Objections") at 6.

However, in making his objections to the recommendation and order, Meinen simply reprinted, verbatim, the brief which he originally submitted to the magistrate in support of his motion to dismiss, supplemented by a one-paragraph objection stating that he disagrees with the magistrate's conclusion and application of the relevant case law. Meinen's Objections at 10.

This type of cut and paste tactic does not invoke the district court's obligation to perform a *de novo* review of the magistrate's recommendation. Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 13.03(c), parties should use the objection process as an opportunity to engage in meaningful legal discourse with the district court. "Without specific reference to portions of the Magistrate's decision and legal discussion on the objected portions, the district court's duty to make a *de novo* determination does not arise. The general statements that a party 'objects' and 'incorporates all arguments previously made to the magistrate' will not suffice." *United States v. Molinaro,* 683 F. Supp. 205, 211 (E.D. Wis. 1988). Therefore, the court will not review the magistrate's decision beyond the cursory effort spent by the defendant. As the magistrate indicated in his recommendation and order, the defendant himself acknowledges that the issue of his role in the management and operation of the enterprise boils down to a question of fact for the jury to decide. Recommendation and Order at 34. Therefore, the court will adopt the magistrate's recommendation to deny the defendant's motion.

VI. Meinen's Objection to 35-39

The magistrate denied Meinen's motion to dismiss, strike or exclude Racketeering Act 23 in Count 1 and Count 3 for failure to allege the type of controlled substance distributed. Recommendation and Order at 35-39. The magistrate also denied Meinen's motion to strike paragraph 19(d) under Category IV, Means and Methods. *Id.* Meinen objects. Meinen argues that the magistrate misapplied the Seventh Circuit's decision in *United States v. Hinkle,* 637 F.2d 1154 (7th Cir. 1981). The magistrate held that *Hinkle* did not apply in Meinen's case because Meinen was charged with conspiracy to distribute controlled substances, whereas the defendant in *Hinkle* was charged with several distinct substantive offenses. Citing *United States v. Roman,* 728 F.2d 846 (7th Cir. 1984), and *Wong Tai v. United States,* 273 U.S. 77 (1927), the magistrate concluded that an indictment alleging conspiracy need not be as detailed and specific as an indictment alleging a substantive offense. Meinen also argues that the magistrate's conclusion is incorrect in light of the fact that the magistrate granted the motion for a bill of particulars but denied the motion to strike Racketeering Act 23 from Counts One and Three of the indictment and for further failing to strike paragraph 19(d) under category IV, Means and Methods. Meinen cites no new authority or arguments, however, to support this argument or his claim that the magistrate misapplied *Hinkle.*

In contrast, the government argues that an indictment need not explicitly state the type of narcotics Meinen is alleged to have dealt. The government agrees with the magistrate's conclusion that the type and quantity of drugs need not be explicitly stated in the indictment when

the defendant is charged with conspiracy pursuant to section 846.

The court agrees with the magistrate's conclusion. The quantity and type of narcotics dealt by Meinen is more in the nature of a sentencing issue and need not be pled in the indictment with exact specificity. Furthermore, the indictment in this case sets forth the essential elements for the offenses charged.

Accordingly, the court rejects Meinen's objection and adopts the magistrate's recommendation and order on this point.

VII. Meinen's Objection to 40-44

The magistrate denied Meinen's motion to dismiss, strike, or exclude references reflected in Racketeering Act Number Three because the government cannot prove the allegations therein. Recommendation and Order at 44. The magistrate recommended that the charges from the indictment relating to an alleged murder plot by Meinen should not be dismissed because the government claims to have proof beyond that contained in the indictment. As a result, the magistrate concluded that whether the government could prove the allegations beyond a reasonable doubt is a matter to be resolved at trial. Meinen objects.

Meinen argues that the magistrate incorrectly distinguished *United States v. Hall,* 20 F.3d 1084 (10th Cir. 1994) and *United States v. Risk,* 843 F.2d 1059 (7th Cir. 1988), from his case. Meinen also argues that the government failed to dispute his assertions that the facts as stated in the indictment do not state an offense which has

been committed as a matter of law. Meinen also relies on *Hall* and *Risk* as authority in his objection.

The government argues that the narrow exception carved out by the court in *Hall* and *Risk* does not apply to the present case because Meinen does not have access to all of the evidence that will be introduced at trial. As a result, the government argues, dismissal of the charges pursuant to *Hall* and *Risk* would be inappropriate.

The court agrees with the magistrate's recommendation. The cases relied on by Meinen are inapplicable to the present case. In *Hall,* the district court dismissed one count of a multi-count indictment on the ground that the undisputed facts failed to show a violation of the statute charged in the indictment. The Tenth Circuit affirmed the dismissal but cautioned that such a dismissal prior to trial was a rare occurrence and stated that such an extraordinary remedy was only appropriate in a situation where the operative facts are undisputed and the government fails to object to the district court's consideration of the undisputed facts. *Hall,* 20 F.3d at 1088.

Similarly, in *Risk,* the district court dismissed the indictment after concluding that the government's own facts did not conform to the allegations in the indictment. The Seventh Circuit affirmed, concluding that the government could not prove its case because "there was no case to prove." *Risk*, 843 F.2d at 1061.

Quite clearly, the situation at hand is markedly different from those presented in *Hall* and *Risk*. Here, unlike *Hall*, the facts charged in the indictment constitute a violation of the RICO statute. Also, unlike *Hall*, the government has not acknowledged that two references buried within 10,000 pages of released discovery are the

only pieces of evidence that it intends to introduce to prove that Meinen conspired to commit murder as alleged in Racketeering Act No. 3. Therefore, the Tenth Circuit's limited *Hall* exception does not apply.

Risk is also readily distinguishable. Here, unlike *Risk*, the government has not agreed with Meinen's assertions that the facts he presents in his motion constitute the sole evidence of the specific crime alleged in Racketeering Act No. 3. Thus, the facts of this case are easily distinguished from *Risk*, and its holding does not apply here.

For these reasons, the court rejects Meinen's objection and adopts the magistrate's recommendation and order on this point.

VIII. Morgan's Objection to 54-56

The magistrate denied Morgan's objection to strike charges relating to years when Morgan did not hold any authority role in the Outlaw club. Recommendation and Order at 54-56. The magistrate stated that the Seventh Circuit explicitly refused to limit the reach of 18 U.S.C. § 1962(c) to upper level management in the case *MCM Partners, Inc. v. Andrews-Bartlett & Associates,* 62 F.3d 967 (7th Cir. 1995), and concluded that an enterprise may be operated by lower-rung participants who are under the direction of upper management. Recommendation and Order at 55. Morgan objects.

Morgan argues that the magistrate incorrectly interpreted *MCM Partners* and *Reves v. Ernst & Young,* 507 U.S. 170 (1993). Morgan argues:

> The magistrate's decision is flawed and must be rejected by this court. There is no allegation in

> the indictment that satisfied the *Reves* test. No claim is made as to what role Morgan allegedly held that would bring him into the ambit of operating the RICO enterprise that is here at issue. Since the government has failed to allege and prove a true managerial role, they cannot bootstrap by implication that Morgan made decisions or carried them out. The Government presumably knows that Mr. Morgan did not hold any Outlaw office for the vast majority of the nine years alleged in the conspiracy.

Morgan's Objections at 3.

In response, the government argues that the magistrate correctly interpreted and applied the law. The government cites the portions of the indictment which allege that Morgan along with other members of the organization conducted and participated in specific criminal activity as the means and methods of accomplishing the criminal objects and purposes of the enterprise.

The court concludes, as the magistrate did, that the motion should be denied. The Seventh Circuit's holding in *MCM Partners* is not inconsistent with the Supreme Court's *Reves* decision even though the Supreme Court left open the question of exactly how far enterprise liability may reach. Because this is the only objection set forth by Morgan in relation to the magistrate's recommendation, the court rejects the objection and adopts the magistrate's recommendation and order on this point.

IX. Morgan's Objection to 56-58

The magistrate denied Morgan's motion to strike various aspects of the RICO charges as incompatible with

the proper interpretation of the RICO statute. Recommendation and Order at 57. The magistrate concluded that the indictment set forth sufficient detail regarding the "relatedness" and "continuity" of the racketeering acts to show a "pattern of racketeering" under *H. J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229 (1989). Morgan joins McVay, Meinen, and Blake in this objection.

In objecting to the magistrate's conclusion, Morgan argues that the magistrate failed to analyze whether Morgan's actions satisfy the prerequisites for a proper RICO charge. Morgan's Objections at 3. Morgan essentially alleges that the magistrate failed to determine whether Morgan engaged in a pattern of related and continuous racketeering activity and that the magistrate did not analyze whether Morgan satisfied the Seventh Circuit's relatedness test found in *Morgan v. Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986).

The government argues that the first four sections of the indictment spell out the necessary factual allegations to support a finding that the alleged racketeering acts alleged against Morgan are not separate and disparate but have sufficient relatedness to satisfy the *Morgan* test.

The court agrees with the magistrate's conclusion. The indictment sets forth more than enough facts to satisfy the "relatedness" requirement for establishing a RICO charge. The criminal activity identified in Sections III and IV of Count 4 of the indictment are alleged to be purposeful activities sanctioned and engaged in by the enterprise. Section III specifically charges that the object and purpose of the Outlaws was to control territory for purposes of trafficking in narcotics, to possess and traffic in stolen motor vehicle parts, to commit acts of robbery

and burglary for the benefit of the Outlaws, and to possess and traffic in counterfeit currency. In order to accomplish these objects and purposes of the enterprise, the indictment alleges that Morgan engaged in acts including murder, arson, robbery, possession with intent to distribute controlled substances, transportation of stolen motor vehicle parts across states lines, utterance of counterfeit money, and transportation of firearms, silencers, and explosives. Thus, the indictment sufficiently sets forth a pattern of related and continuous criminal acts under 18 U.S.C. § 1962(c). Therefore, the court rejects Morgan's objection and adopts the magistrate's recommendation and order on this point.

X. Blake's Objection to 67-69

The magistrate denied Blake's motion to strike portions of the indictment because it violated his due process rights. Recommendation and Order at 67-69. The magistrate concluded that the indictment sufficiently alleged a pattern of racketeering such that Blake has adequate knowledge of the charges filed against him. Blake objects.

Blake first objects to the magistrate's conclusion that the indictment provided fair warning of the charges against him. Blake cites two cases to support his argument that an indictment which alleges an open-ended ten year long conspiracy fails to put the defendant on notice of the charges against him, *United States v. Weissman,* 899 F.2d 1111 (11th Cir. 1990), and *United States v. Lemm,* 680 F.2d 1193 (8th Cir. 1982). Blake fails to provide any analysis, however, as to how these cases are similar to the facts at hand. More troubling is the fact that these cases do not even stand for the proposition cited by Blake.

Therefore, the court agrees with the magistrate on this point.

Blake also argues that the indictment does not sufficiently allege a pattern of racketeering activity. Blake argues that the court should find the entire RICO statute unconstitutionally vague or, in the alternative, that Blake's alleged conduct in the indictment is so sporadic that it does not constitute the necessary "pattern of racketeering" under RICO.

The court rejects Blake's invitation to strike the RICO statute as unconstitutionally vague because Blake failed to raise this argument before the magistrate. Blake's argument that the indictment fails to allege a pattern of racketeering is similar to the one made above by defendant Morgan. However, Blake fails to take into account all of the factual details included in Section III and IV of Count Four of the indictment, including the fact that he is alleged to have engaged in narcotics distribution over a ten year period.

Therefore, the court rejects Blake's objection and adopts the recommendation of the magistrate on this point.

XI. Blake's Objection to 69-73

The magistrate denied Blake's motion to strike various portions of the indictment because they violate his First Amendment right to free association. The magistrate denied the motion on the basis that Blake was not indicted for being a member of the Outlaw Motorcycle Club, as such an indictment would be unconstitutional pursuant to *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Instead, the magistrate determined that the government indicted Blake because allegedly he knowingly and intentionally engaged in illegal conduct through a pattern of racketeering activity. Blake objects.

Blake's objection is that he will most likely be found guilty solely by association with other "unseemly" members of the Outlaws. This objection is nothing more than repetition of what he argued before the magistrate, and he gives no new reasons why the argument should succeed at this point. Blake has been indicted for his criminal conduct, *not* his mere association with the Outlaws. To the extent that Blake is concerned about the introduction of specific evidence at trial which may implicate him as a member of the Outlaws, the government may do so in order to prove the membership element of the RICO charge.

For these reasons, the court rejects Blake's objection and adopts this portion of the magistrate's recommendation.

XII. Miller's and Powers' Objections to 73-80

The magistrate denied Miller's and Powers' motion to strike prejudicial surplusage. Recommendation and Order at 73-80. Miller and Powers object.

In his objection, Powers merely states that he incorporates by reference his submissions to the magistrate. This is insufficient, and his objection is therefore overruled. The court adopts the magistrate's recommendation as to Powers' motion to strike surplusage.

Miller states that the magistrate too narrowly construed his own discretion under Fed. R. Crim. P. 7(d). The

court disagrees. All of the information that Miller would like stricken from the indictment is entirely relevant because it connects Miller by alias or nickname to the Outlaw Motorcycle Club. In addition, the allegations in the indictment that the Outlaws are a "criminal enterprise" whose members engage in "various criminal acts" are relevant because they are the very heart of the RICO charges leveled in the indictment. Accordingly, the court rejects Miller's objection and adopts the magistrate's recommendation on this point as well.

XIII. Meinen's Objections to 85-89

The magistrate granted in part and denied in part Meinen's motion for a bill of particulars. Specifically, the magistrate directed the government to provide each defendant with the identity of the specific controlled substance that each defendant is charged with conspiring to distribute within 10 days of the District Court's order on the Round III motions. The magistrate denied Meinen's motion to the extent that Meinen demanded that the government disclose the exact time, date, place, and witnesses to each occurrence as well as the total amount and weight of the drugs which were possessed and distributed during the course of the conspiracy. The magistrate denied the motion on the basis that the government did not have to disclose the names of witnesses and exact times and dates because such information is "evidentiary detail that the government is not required to provide through a bill of particulars" and because the defendants were not charged with any substantive offenses but only conspiracy to distribute controlled substances. Recommendation and Order at 89. Similarly, the magistrate stated that the government need not disclose the amount

of controlled substances because the quantity of drugs is a sentencing factor. *Id.* Meinen objected to the portion of the magistrate's recommendation and order in which the magistrate denied his motion.

On November 10, 1998, the government obtained a superseding indictment stating the types of controlled substances that Meinen allegedly conspired to distribute. Therefore, the need for the government to provide a bill of particulars stating the specific types of controlled substances is moot. Meinen has no right, however, to a bill of particulars as to specific dates, times, witnesses, and other evidentiary detail because he has not been charged with any specific substantive offense but only conspiracy to distribute controlled substances.

For these reasons, the court rejects the magistrate's recommendation to the extent it required the government to provide a bill of particulars to allege the type of controlled substances and also rejects Meinen's motion for a bill of particulars as to specific dates, times, places, and witnesses.

XIV. Meinen's and Miller's Objections to 94-96

The magistrate denied the motion by Meinen and Miller to sever Counts One, Two, and Three from Counts Four, Five, and Six of the indictment. Each defendant filed the motion to sever based on the fact that they were only charged with the first three counts. The magistrate found that all of the counts in the indictment were sufficiently related pursuant to Fed. R. Crim. P. 8(a). Recommendation and Order at 94-96. Meinen and Miller object.

Meinen's objection consists of no analysis other than the statement that the relationship between Counts One and Four was not sufficient pursuant to the "like class" standard described in *United States v. Alexander,* 135 F.3d 470 (7th Cir. 1998). Miller's objection is simply that there is no relationship between Counts One through Three and Counts Four through Six of the indictment.

Federal Rule of Criminal Procedure 8(a) permits joinder of offenses in the same indictment so long as the crimes belong to the same class even if they are not temporally or evidentially related. *Alexander,* 135 F.3d at 476. Here, the magistrate concluded that Counts Four, Five, and Six were sufficiently related to Count One, which alleged that the defendants conducted or participated in the conduct of the enterprise's affairs through a pattern of racketeering activity.

The court concludes that the magistrate was correct in his interpretation of Rule 8(a). Count One of the indictment charges a violation of substantive RICO. Count Four alleges that several defendants other than Miller and Meinen assaulted members of another motorcycle gang with a dangerous weapon in violation of 18 U.S.C. § 1959, i.e., violent crime in aid of racketeering activity. There is no question that the acts alleged in Count Four were done to further the enterprise alleged in Count One. Therefore, Count Four is appropriately joined with Count One.

Similarly, Counts Five and Six are appropriately joined. Count five alleges that O'Neill along with Kruppstadt and Powers transported an explosive device in interstate commerce with knowledge that it would be used to kill, injure, or intimidate a person and destroy property in violation of 18 U.S.C. §§ 844(d) and (2). This act is also

alleged as one of the racketeering acts in Count One, namely Racketeering Act 14. Thus, it is undisputed that Count Five is properly joined with Count One of the indictment.

Count Six alleges a separate violation of 18 U.S.C. §§ 844(d) and (2). This act is also alleged as the basis for Racketeering Act 15 of Count One of the indictment. Thus, it is also undisputed that Count Six is properly joined with Count One pursuant to rule 8(a).

As a result, the court rejects Miller's and Meinen's objections and adopts this portion of the magistrate's recommendation.

XV. Meinen's Objection to 97-98

The magistrate denied Meinen's motion for severance pursuant to rule 8(b). Recommendation and Order at 97-98. Based on his conclusion that all of the counts in the indictment were properly joined, the magistrate found that Meinen was properly joined even though he was not named in every count of the indictment. Meinen objects.

Meinen's objection is simply that he "takes issue" with the magistrate's conclusion that each count of the indictment was properly joined pursuant to Rule 8(a) and that the counts are not related and severance of the defendants is appropriate. Meinen cites no cases or authority to support this argument.

The plain language of Rule 8(b) states that not all of the defendants need be charged in each count of the indictment for joinder to be proper. Therefore, even though Meinen is not named in every count of the indictment, joinder is appropriate in this case and Meinen's motion is

denied. Thus, the court rejects Meinen's objection and adopts the magistrate's recommendation and order on this point.

XVI. Jensen's and Blake's Objections to 99-105

Magistrate Callahan denied the motions by Blake, Hanson, Jensen, McVay, O'Neill, Rostron, and Warneke to sever on the basis of spillover prejudice. Recommendation and Order at 105. The magistrate stated that limiting instructions would alleviate prejudice caused by a joint trial and that no defendant had shown that he would not be able to get a fair trial. *Id.* at 104-05. Jensen and Blake object.

Jensen argues in his objections that the amount of evidence pertaining to the other defendants far outweighs the amount of evidence pertaining to him. Defendant Leslie Jensen's Objections to Magistrate Judge's Recommendation and Order on Round III of Pretrial Motions (hereinafter "Jensen's Objections"). The magistrate held that the defendants' arguments that the jury would not follow limiting instructions and would not be able to sort through the evidence did not rebut the presumption in favor of a joint trial. Recommendation and Order at 104. Jensen responds that "due to the paucity of references to Mr. Jensen, it would not be surprising if jurors forgot exactly who Mr. Jensen is." Jensen's Objections at 2. The court believes, as the magistrate did, that this lack of faith in the abilities of the jury does not overcome the presumption in favor of a joint trial. Therefore, the court rejects this part of Jensen's objection and adopts the magistrate's recommendation and order on this point.

Blake makes essentially the same argument as Jensen did in his objection, that his small part in this case will be overwhelmed by the more major players. Again, generalized objections about the "significant amount of evidence" in the case do not overcome the presumption in favor of a joint trial, and the court thus rejects this part of Blake's objection. Therefore, the court adopts and affirms the magistrate's denial of the motions by Blake, Hanson, Jensen, McVay, O'Neill, Rostron, and Warneke to sever on the basis of spillover prejudice.

XVII. Meinen's Objection to 107-108

The magistrate denied Meinen's motion for severance based on the detrimental testimony of his co-defendants. The magistrate denied the motion as moot because the government claimed that it had no intention of offering the alleged inculpatory statements made by Schneider against Meinen. Recommendation and Order at 107-108. Meinen objects.

Meinen objects solely for the purpose of preserving the issue for trial. In support of his objection, Meinen states that he is incorporating by reference his arguments as set forth in his prior briefs. As this court has repeatedly stated, a defendant may not incorporate arguments by reference to earlier court submissions. Therefore, Meinen's objection is denied, and the court will adopt this portion of the magistrate's recommendation and order.

XVIII. Jensen's Mroch's, Blake's, and Rostron's Objections to 108.112

The magistrate denied all of the defendants' motions for severances based on alleged exculpatory testimony by

co-defendants. Recommendation and Order at 112. The magistrate held that none of the defendants had satisfied all three prongs of the applicable severance standard: (1) whether the co-defendant's testimony would be exculpatory; (2) whether the co-defendant would in fact testify; and (3) whether the testimony would bear on the defendant's case. Recommendation and Order at 108 (citing *United States v. Studley*, 892 F.2d 518, 523 (7th Cir. 1989)). The magistrate held that Blake, Jensen, Miller, and Mroch failed to satisfy the second prong and that Rostron failed to satisfy the first and third prongs. Jensen, Mroch, Blake, and Rostron object.

Jensen argues that if he is tried separately after Kevin O'Neill is tried, O'Neill will exculpate Jensen at Jensen's trial. Jensen's counsel provides an affidavit stating that "the essence of the evidence which I would elicit from Mr. O'Neill" is that Jensen did not surveil Lamonte Mathias, Jerry Bokina, or other Hell's Henchmen members, nor did he conspire with O'Neill to murder any of these people. *See* Affidavit of Attorney Charles Giesen. Jensen argues that this potential testimony entitles him to a separate trial after O'Neill's trial pursuant to *United States v. Veloz*, 421 F. Supp. 1266 (E.D. Wis. 1976), and *United States v. Vigil*, 561 F.2d 1316 (9th Cir. 1977).

These cases are distinguishable. In *Veloz*, the moving defendant's attorney provided an affidavit stating that the attorney possessed a letter from the other defendant promising to testify that the moving defendant had no knowledge of the crime. *Veloz*, 421 F. Supp. at 1268. Similarly, in *Vigil*, the moving defendant's attorney swore that he learned from the other defendant's attorney that the other defendant would exculpate the moving defendant. *Vigil*, 561 F.2d at 1317. Here, in contrast, Jensen's

counsel does not state why he things O'Neill will testify to these things – Jensen's counsel apparently does not have the assurances of O'Neill or of O'Neill's attorney that O'Neill will testify or that his testimony will exculpate Jensen. As the magistrate correctly noted, "[t]o justify severance, a defendant must provide some support, such as an affidavit or recorded testimony, that his codefendant would testify in a manner which would exculpate him." Recommendation and Order at 109 (citing *Studley*, 892 F.2d at 525 (citing *United States v. Andrus*, 775 F.2d 825, 847 (7th Cir. 1985))). Unsupported assertions by a defendant's attorney, despite being in affidavit form, will not suffice. Therefore, the court rejects Jensen's objection on this point.

Mroch also objects, stating that Miller may possess knowledge exculpating Mroch based on recorded conversations between Miller and a confidential informant. Motion and Brief Challenging Magistrate Judge's Round III Recommendation and Order at 1. Mroch states that "[b]ased upon these conversations, it is clear that Defendant Miller has valuable information. . . . " *Id.* However, Mroch does not address the reason why the magistrate denied his motion, that is, the issue of whether the codefendant would in fact testify. Therefore, the court rejects Mroch's objection on this point.

Blake also objects to the magistrate's recommendation, arguing that he will be denied the opportunity to cross-examine Miller and Powers. However, like Mroch, Blake does not address the issue of whether these codefendants would in fact testify, other than stating that he "is not required to establish by means of absolute certainty that the codefendant would testify if severance was granted." Defendant Johnson F. Blake's Objections to

Round III of the Magistrate's Recommendation and Order at 13 (hereinafter "Blake's Objections") (citing *United States v. McKinney*, 453 F.2d 1221, 1223 (9th Cir. 1972)). While that may be true, merely stating this without any support falls far short of stating an objection that would cause this court to disagree with the magistrate on this issue. Therefore, the court will reject Blake's objection.

Unlike the others, Rostron attached a signed affidavit from Kevin O'Neill to his motion for a severance stating that Rostron resigned from the Outlaws in October or November 1993, and that after his resignation, he had no further connection to any club member or club activity. Recommendation and Order at 111.[2] Although Rostron thus may satisfy the second prong of the *Studley* test, the magistrate held that he did not satisfy the first and third prongs because this fact would not be in issue at trial and would not be exculpatory. *Id.* at 112.

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[2] On November 20, 1998, Rostron filed a reply to the government's response to his objections to Round III and included a second O'Neill affidavit stating that O'Neill would testify regarding Rostron's minor level of participation in the Outlaws, as O'Neill's first affidavit stated. Rostron states in his reply brief that he included this second affidavit to clarify that O'Neill is indeed willing to testify for Rostron. Defendant Rostron's Reply in Support of Objections to Magistrate Judge's Recommendation and Order on Round III of Pretrial Motions at 3. However, O'Neill's second affidavit also adds that he would testify that "Rostron was not pursuing the instructions or interests of the Outlaws Motorcycle Club or his Chapter if he committed the offense described in Racketeering Act 12." Kevin P. O'Neill Affidavit (II) at 2. The court will not consider new facts that not only were not raised before the magistrate but were not even raised in connection with Rostron's objections to the magistrate's Round III Recommendation and Order.

Rostron objects, arguing that the magistrate misapprehended the exculpatory value of O'Neill's testimony, although "Rostron's lawyer shares the blame" for this. Defendant Rostron's Objections to Magistrate Judge's Recommendation and Order on Round III of Pretrial Motions (hereinafter "Rostron's Objections") at 22. The magistrate found that all of the alleged racketeering acts took place before Rostron resigned from the Outlaws, so the testimony would not be exculpatory. Recommendation and Order at 111. Although Rostron accepts this, he states that this evidence would establish that Rostron "could have been involved, as a chronological matter, but O'Neill's testimony still would be probative in demonstrating the unlikelihood that this short-time, peripheral member in fact was involved in the club's most serious alleged misdeeds." Rostron's Objections at 23.

Although the court agrees that this evidence might be somewhat probative, Rostron does not object to the magistrate's finding that all of the government's evidence will confirm that Rostron quit the Outlaws in October or November 1995. Recommendation and Order at 111-12. This finding suggests that evidence other than O'Neill's testimony exists which could prove what Rostron wants proven, so a severance would not be justified. *See United States v. Andrus*, 775 F.2d 825, 847 (7th Cir. 1985) (finding no deprivation of fair trial by denial of severance motion when other evidence available). More importantly, if Rostron is not accused of staying in the Outlaws after that point, it does not appear that evidence refuting this "amount[s] to a dramatic and convincing exculpation," as is required to justify severance. *See United States v. Abraham*, 541 F.2d 1234, 1240 (7th Cir. 1976). Therefore,

the court will reject Rostron's objection and will adopt the magistrate's recommendation and order on this issue.

XIX. Kruppstadt's and O'Neill's Objections to 112.114

The magistrate denied Kruppstadt's and O'Neill's motions for severance from Miller due to an alleged conflict of interest posed by Attorney Franklyn Gimbel's representation of Miller and potential government witness Daniel Bishop. Recommendation and Order at 114. The magistrate held that this conflict may be waived and can be circumvented by having substitute counsel examine the former client. *Id.* at 113 (citing *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975)). The magistrate further held that Gimbel's potential inability to effectively cross-examine Bishop would only affect Miller, and Kruppstadt's and O'Neill's attorneys would both be able to effectively cross-examine Bishop. *Id.* at 113-14. The magistrate also held that because everyone is now cognizant of the potential conflict, the chances of a mistrial occurring are low. *Id.* at 114.

Kruppstadt and O'Neill object that "they would be prejudiced in appearing jointly with counsel representing a material witness against them." Objection of Defendants Kruppstadt and O'Neill to the Magistrate's Recommendation and Order Dated August 28, 1998 Regarding Motion for Relief from Prejudicial Joinder with Defendant Miller (hereinafter "Kruppstadt's and O'Neill's Objections") at 3. O'Neill further objects that using substitute counsel to examine Bishop pursuant to *Jeffers* "does not solve the problem at all" because the government may argue that Gimbel passed on confidential information he learned from

Bishop and because Bishop may feel threatened that this confidential information could be used against him. Defendant O'Neill's Objection to Magistrate's Recommendation and Order Re: Motion for Severance Based on Possibility of a Conflict of Interest (hereinafter "O'Neill's Objection") at 2-3. The government responds that even if these potential problems caused a mistrial, that mistrial would only pertain to Miller's trial, not Kruppstadt's or O'Niell's. Government's Response to Round III Objections (hereinafter "Government's Response") at 34.

O'Neill and Kruppstadt have not sufficiently explained why the time-tested *Jeffers* solution would not work in this case. Their speculative objections do not appear to be different from generalized objections that could be raised against the *Jeffers* solution in any case. More importantly, Miller is the only defendant who could be prejudiced by Gimbel's alleged conflict of interest. The court does not see how O'Neill and Kruppstadt may be prejudiced by Gimbel's possible inability to effectively cross-examine Bishop, because O'Neill's counsel and Kruppstadt's counsel suffer no such infirmity and are free to cross-examine Bishop as vigorously as they please. Therefore, the court will reject their objections on this point.[3]

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[3] If it appears that Gimbel will at some point need to cross-examine Bishop in the course of representing Miller, the court will ensure that the dictates of *Jeffers* are followed at that juncture. However, no party has indicated thus far that Gimbel definitely will need to cross-examine Bishop on behalf of Miller, so the court will not conduct or order the *Jeffers* procedure at this time.

O'Neill also objects that Gimbel suffers a conflict of interest from previously representing multiple defendants in this case who may have paid him for that representation, while he now represents only Miller. O'Neill's Objection at 2. The government responds that this claim should be rejected because it is not supported by the record. Government's Response at 34-35. However, the government also states that "the claims made by O'Neill are sufficiently serious to warrant an inquiry and, if necessary, a hearing to advise the affected defendants of the potential conflict." *Id.* at 35 n.1. Because the record is apparently barren on this issue, the court will follow the parties' suggestion and will remand to the magistrate for an inquiry or hearing regarding whether defendants other than Miller have paid Gimbel to represent them and whether the affected defendants are aware of this potential conflict. Otherwise, the court adopts the magistrate's recommendation and order regarding the motions for severance based on Gimbel's alleged conflict of interest.

XX. McVay's, Jensen's, and the Government's Objections to 114-16

Because of concerns about a "mega-trial," the magistrate directed the government to submit a plan for severance "that calls for the trial of no more than five to six defendants at any one time." Recommendation and Order at 116. The government objected, instead proposing a plan for two trials, one with eight or nine defendants and the other with seven defendants. Government's Objection to Magistrate Judge's Recommendation and Order Re: Round III Pretrial Motions at 2. McVay does not object to the magistrate's recommendation and order other than to request that the defendants be allowed to submit a plan

for severance. Similarly, Jensen does not object, but requests an opportunity to object to or present comments on the government's proposal.

Although the court shares the magistrate's concerns regarding a potential mega-trial, the court will not adopt a specific severance plan at this time. Instead, the court will await disposition of the defendants' appeals currently pending before the Seventh Circuit (case number 98-3734 et. seq.), together with the determination of any additional pretrial motions triggered by the return of the superseding indictment. At that juncture, noting the complex nature of this case, coupled with the substantial disruption to this court's docket in scheduling disposition of these defendants for trial, as well as the government's substantial commitment necessary for trial preparation, the court, in consultation with counsel for the parties, will establish a uniform cut off date applicable to all defendants to resolve their respective case short of trial. Once that deadline passes, no defendant will remain eligible for consideration for an appropriate offense level adjustment for acceptance of responsibility under U. S. Sentencing Guideline 3E1.1(b). This will place the court in a better position to evaluate and make appropriate determinations regarding severance based upon mega-trial concerns.

XXI. CONCLUSION

Accordingly,

IT IS ORDERED that the motions to adopt submitted by Hanson (Docket Nos. 730 and 735), Blake (Docket No. 743), Miller (Docket No. 744), Jensen (Docket No. 748), Meinen (Docket Nos. 752, 765 and 768), Morgan (Docket No. 756), O'Neill (Docket No. 757), Rostron (Docket No.

766), Kadlec (Docket No. 785) and Kruppstadt (Docket No. 792) be and the same are hereby **GRANTED**;

IT IS FURTHER ORDERED that Rostron's "Motion to Dismiss the Indictment and Stay Proceedings" (Docket No. 494) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Rostron's "Motion to Strike All Racketeering Acts Involving Conspiracy From Counts One and Two" (Docket No. 496) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Rostron's "Alternative Motion to Require Election of One Racketeering Act Involving Conspiracy" (Docket No. 498) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Rostron's "Motion to Strike Predicate Acts of Conspiracy From Count Two" (Docket No. 497) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Meinen's, McVay's, and Blake's "Motion to Dismiss or Strike Counts One and Two" (Docket No. 517) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Meinen's, McVay's and Blake's "Motion to Dismiss, Strike or Exclude" [racketeering act number 23 in Counts One and Three for failure to allege the type of controlled substances distributed] (Docket No. 519) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Meinen's, McVay's and Blake's "Motion to Dismiss Count One of the Indictment as to those Defendants as Insufficient to Meet

the Requirements of 18 U.S.C. § 1962(c), and of Defendants Meinen and Blake to Strike Portions of Count One as Insufficient to Meet the Requirements of 18 U.S.C. § 1962(c)" (Docket No. 534) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Morgan's "Motion to Strike Various Aspects of the RICO Charges in this Case Due to Their Violation of His Right to Due Process" (Docket No. 532) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Morgan's "Motion to Strike Charges Relating to the Years When He Was Not in Any Authority Role in the Outlaw Motorcycle Club" (Docket No. 533) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Morgan's "Motion to Strike Various Aspects of the RICO Charges in this Case as Incompatible with a Proper Interpretation of the RICO Statute" (Docket No. 531) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Warneke's [as joined by other defendants] "Combined Motion to Dismiss Duplicitous and Multiplicitous [sic] Conspiracy Charge Racketeering Act 23 in Count One and Counts Two and Three" (Docket No. 536) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Blake's, Meinen's, O'Neill's and McVay's "Motion to Strike Various Aspects of the RICO Charges Due to Their Violation of His Right to Due Process" (Docket No. 539) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Blake's, Meinen's, O'Neill's and McVay's "Motion to Strike Various Aspects of

the RICO Charges in this Case as a Violation of the First Amendment's Right to Freedom of Association" (Docket No. 541) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that Miller's objection to the magistrate's denial of his "Motion to Strike Prejudicial Surplusage" (Docket No. 549) be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that Powers' objection to the magistrate's denial of his "Motion to Strike Surplusage From Indictment" (Docket No. 551) be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that Meinen's objection to the magistrate's denial of his "Demand for Bill of Particulars" (Docket No. 516) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that the magistrate's partial grant of Meinen's "Demand for Bill of Particulars" (Docket No. 516) be and the same is hereby **VACATED** as moot;

IT IS FURTHER ORDERED that Meinen's objection to the magistrate's denial of his "Motion for Severance of Defendants and Counts" (Docket No. 514) be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that Miller's objection to the magistrate's denial of his "Motion to Sever Counts" (Docket No. 547) be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that Jensen's objection to the magistrate's denial of Miller's "Motion to Sever Counts" (Docket No. 547), Hanson's "Motion for Severance" (Docket No. 186), Mroch's "Motion for Severance from Defendant Randall Miller" (Docket No. 485), Blake's "Motion for Severance Pursuant to Fed. R. Crim. P. 14 from Defendants Kevin P. O'Neill and Randall E. Miller" (Docket No. 543), and Miller's "Motion for Severance of Defendants" (Docket No. 546) be and the same are hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that Meinen's objection to the magistrate's denial of his "Motion for Severance" (Docket No. 512) be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that Rostron's objection to the magistrate's partial denial of his "Motion to Sever Co-Defendants" (Docket No. 502) be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that Jensen's objection to the magistrate's partial denial of his "Motion for Severance of Defendants" (Docket No. 505) be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that McVay's objection to the magistrate's partial denial of his "Motion to Sever on the Basis of Misjoinder of Defendants and Counts" (Docket No. 535) be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that Warneke's objection to the magistrate's partial denial of his "Rule 14 Motion for Relief from Prejudicial Joinder of Defendants" (Docket No. 537) be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that Kruppstadt's objection to the magistrate's denial of his "Motion for Relief from Prejudicial Joinder Under F.R.Cr.P.Rule 14" (Docket No. 492), be and the same is hereby **DENIED** and the court hereby **ADOPTS** the magistrate's order on this point;

IT IS FURTHER ORDERED that O'Neill's objection to the magistrate's denial of his "Motion for Severance from Defendant Randall Miller" (Docket No. 508) as it relates to the alleged conflict of interest involving Daniel Bishop be and the same is hereby **PARTIALLY DENIED** and the court hereby **ADOPTS** the magistrate's order on this point with the exception of O'Neill's objection to the magistrate's denial of his "Motion for Severance from Defendant Randall Miller" (Docket No. 508) as it relates to Attorney Franklyn Gimbel's alleged conflict of interest with regard to his previous representation of defendants, on which point the magistrate's order be and the same is hereby **VACATED** and the motion is **REMANDED** to Magistrate Judge William E. Callahan, Jr. for further determination consistent with this decision;

IT IS FURTHER ORDERED that the Government's, McVay's and Jensen's responses to the magistrate's partial denial of Morgan's "Motion to Sever on the Grounds that this Case Will Potentially Be a Mega-Trial" (Docket No. 529) as well as their objections and/or

responses to the Mega-Trial portions of Rostron's "Motion to Sever Co-Defendants" (Docket No. 502), Jensen's "Motion for Severance of Co-Defendants" (Docket No. 505), McVay's "Motion to Sever on the Basis of Misjoinder of Defendants and of Counts" (Docket No. 535), and Warneke's "Rule 14 Motion for Relief from Prejudicial Joinder of Defendants" (Docket No. 537) be and the same are hereby **DENIED** without prejudice.

Dated at Milwaukee, Wisconsin, this 15th day of December, 1998.

BY THE COURT:

/s/ J. P. Stadtmueller
J. P. Stadtmueller
Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 97-CR-98

Kevin P. O'Neill
a/k/a "Spike",
Carl J. Warneke
a/k/a "Jay",
Raymond L. Morgan, Jr.
a/k/a "Shemp",
Robert A. Kruppstadt
a/k/a "Clay",
Richard E. Mroch
a/k/a "Richie",
Randy M. Yager
a/k/a "Mad",
Johnson F. Blake
a/k/a "Beeker",
William B. Brock
a/k/a "Bad Bill",
James E. Hanson
a/k/a "Manson",
David A. Kadlec
a/k/a "Kid",
Allen J. McVay
a/k/a "Big Al",
James E. Meinen, Jr.
a/k/a "LJ",
Randall E. Miller
a/k/a "Madman",
Harvey E. Powers
a/k/a "RV",

James C. Rostron
a/k/a "Just Jim",
James W. Schneider
a/k/a "Preacher", and
Leslie John Jensen
a/k/a "Jack",

Defendants.

Superseding Indictment

(Filed Nov. ___)

The Grand Jury charges:

Count One

I. Introduction

1. At times material to this indictment:

a. The American Outlaw Association, better known as, and hereinafter referred to as, the Outlaws Motorcycle Club, was an international organization which engaged in, and the activities of which affect, interstate and foreign commerce.

b. Within the United States, the Outlaws Motorcycle Club is composed of individual chapters located in various cities throughout the country. Each chapter has a president, vice-president, treasurer and enforcer, as well as general members.

c. The various chapters are grouped into regions headed by a regional president and several additional regional officers. The regions, and each chapter thereof, ultimately falls under the authority of the national president.

d. The Chicago Region is comprised of three (3) chapters located in the Chicago metropolitan area, and chapters located in Joliet, Illinois; Gary, Indiana; and Milwaukee, Janesville, and Lacrosse, Wisconsin.

e. Membership in the Outlaws Motorcycle Club, which is limited to males only, is the result of a controlled process, beginning with an associate or "hanger-on" status, followed by a pledge or probationary period lasting approximately six (6) months. During the pledge period, probates are expected to perform duties and assignments as directed by full members or "patches". Full membership or "patch" status requires the unanimous vote of the chapter sponsoring membership. New chapters will go through a probationary period for both the chapter and the individual members. Full Outlaws status for both the chapter and the members requires the unanimous vote of the chapter presidents within the region.

f. "Patches" and probates are expected to abide by a written code. Violations of the code may result in fines, expulsion, another probationary period, and/or physical violence.

g. The vestments or "colors" of full club membership include a leather or denim vest with a back patch consisting of the club emblem (skull with crossed pistons), surrounded by a top "rocker" with the word "Outlaws" and a bottom "rocker" identifying the chapter (e.g. "Milwaukee"). The vests may also display other symbols such as "MC" (motorcycle club), "A.O.A.", and a "One Percenter" diamond.

h. Probates will wear vests displaying patches identifying their probationary status. Females, though excluded from membership, may wear vests with patches

reading "Property of Outlaws". Females associated with members, pledges or associates are referred to as "Old Ladies".

i. Members pay monthly dues to the chapter, a percentage of which is forwarded to the regional and national organizations. Members are also subject to special assessments or "taxes" for various special purposes. Funds are transferred between chapters and the regional and national organizations as the need may require. Club members engaging in criminal activity which generates a profit are expected to contribute a portion of those proceeds to the chapter.

j. Chapter meetings are held regularly and are referred to as "church". Only full, patched members are allowed to attend "church".

k. Patched and probate members are required to attend certain special events referred to as "runs", which may be organized on either the national or regional level. Failure to attend a "run" as required, subjects the member to disciplinary sanction.

II. The Enterprise

2. At various times relevant to this indictment, the defendants and others known and unknown, were members and associates of the Chicago Region of the Outlaws Motorcycle Club, a criminal organization whose members and associates engaged in acts of violence, including murder, robbery and arson; narcotics trafficking; trafficking in stolen motor vehicles and motor vehicle parts; interstate transportation of stolen property; and the sale,

purchase and passing of counterfeit United States currency.

3. The Chicago Region of the Outlaws Motorcycle Club, including its leadership, membership and associates, constituted an "enterprise," as defined by Title 18, United States Code, Section 1961(4) (hereinafter the enterprise), that is, a group of individuals associated in fact. This enterprise was engaged in and its activities affected, interstate and foreign commerce.

4. The Wisconsin/Stateline Chapter of the Outlaws Motorcycle Club (hereinafter the Wisconsin Chapter) is a local chapter of the national club, Chicago Region, which is active primarily within the southeastern/central counties of Wisconsin and the northeastern/central counties of Illinois, i.e. the stateline area. The chapter became an Outlaws chapter on or about January 1, 1991. Prior to that time, the chapter existed as the Booze Runners, a local motorcycle club allied with the Outlaws. The Booze Runners, and later the Wisconsin Chapter, operated from a chapter house located at 42741 Route 45, Antioch, Lake County, in the Northern District of Illinois from at least 1988 until 1994, when the clubhouse burned. Thereafter, the Wisconsin Chapter established a clubhouse at 1263 South Cherry Street, Janesville, Rock County, in the Western District of Wisconsin. The Wisconsin Chapter also used a facility located at 1106 Main Street, Union Grove, Racine County, in the Eastern District of Wisconsin, as a meeting place. The Wisconsin Chapter has elected officers and formal membership categories indicated by the appropriate vestments.

5. The Milwaukee Chapter of the Outlaws Motorcycle Club (hereinafter the Milwaukee Chapter) is a local

chapter of the national club, Chicago Region, which is active primarily in the Milwaukee, Wisconsin metropolitan area. The Milwaukee Chapter has operated from a chapter house located at 1835-9 South 2nd Street, Milwaukee, Milwaukee County, in the Eastern District of Wisconsin, from at least 1988 to the present. The Milwaukee Chapter has elected officers and formal membership categories indicated by the appropriate vestments.

6. The Chicago (Southside) Chapter of the Outlaws Motorcycle Club (hereinafter the Chicago (Southside) Chapter) is a local chapter of the national club, Chicago Region, which is active primarily in the Chicago, Illinois metropolitan area. The Chicago (Southside) Chapter has operated from a chapter house located at 2601-03 W. 25th Street, Chicago, Cook County, in the Northern District of Illinois, from at least 1992 to the present. From at least 1988 to 1992 the chapter operated from a chapter house located at 2201 Roosevelt Road, Chicago, Cook County, in the Northern District of Illinois. Prior to approximately July 15, 1995, the Chicago (Southside) Chapter was the only local chapter of the Outlaws Motorcycle Club in the Chicago metropolitan area, and was known as the Chicago Chapter. The Chicago (Southside) Chapter has elected officers and formal membership categories indicated by the appropriate vestments.

7. The Chicago (Northside) Chapter of the Outlaws Motorcycle Club (hereinafter the Chicago (Northside) Chapter) is a local chapter of the national club, Chicago Region, which is active primarily in the Chicago, Illinois, metropolitan area. The chapter became an Outlaws chapter on or about July 15, 1995. Prior to that Time, the chapter existed as the Wheelman, a local motorcycle club allied with the Outlaws. The Wheelmen, and later the

Chicago (Northside) Chapter, operated from a chapter house located at 3745 Division Street, Chicago, Cook County, in the Northern District of Illinois, from at least 1988 to the present. The Chicago (Northside) Chapter has elected officers and formal membership categories indicated by the appropriate vestments.

8. The Chicago (Westside) Chapter of the Outlaws Motorcycle Club (hereinafter the Chicago (Westside) Chapter) is a local chapter of the national club, Chicago Region, which is active primarily in the Chicago, Illinois, metropolitan area. The chapter became an Outlaws chapter on or about July 15, 1995. Prior to that time, the chapter existed as the High Spirits, a local motorcycle club allied with the Outlaws. The High Spirits, and later the Chicago (Westside) Chapter, operated from a chapter house located at 214 Park Street, Bensenville, Du Page County, in the Northern District of Illinois, from at least 1994 to the present. From at least 1988 to 1994, the High Spirits operated from a chapter house located at 1228 E. Harding, Des Plaines, Cook County, in the Northern District of Illinois. The Chicago (Westside) Chapter has elected officers and formal membership categories indicated by the appropriate vestments.

9. The Joliet Chapter of the Outlaws Motorcycle Club (hereinafter the Joliet Chapter) is a local chapter of the national club, Chicago Region, which is active primarily in Will County, Illinois. The Joliet Chapter has operated from a chapter house located at 1917 E. Washington Street Joliet, Will County, in the Northern District of Illinois, from at least 1992 to the present. From at least 1988 to 1992, the Joliet Chapter operated from a chapter house located at 204 Oak Street Lockport, Will County, in the Northern District of Illinois. The Joliet Chapter has

elected officers and formal membership categories indicated by the appropriate vestments.

10. The Gary Chapter of the Outlaws Motorcycle Club (hereinafter the Gary Chapter) is a local chapter of the national club, Chicago Region, which is active primarily in Lake County, and northeast, Indiana area. The Gary Chapter has operated from a chapter house located at 3265 Carolina Street, Gary, Lake County, in the Northern District of Indiana from at least 1988 to the present. The Gary Chapter has elected officers and formal membership categories indicated by the appropriate vestments.

11. The LaCrosse Chapter of the Outlaws Motorcycle Club (hereinafter the LaCrosse Chapter) is a local chapter of the national club, Chicago Region, which is active primarily in the LaCrosse County and west central Wisconsin area. The LaCrosse Chapter has operated from a chapter house located at 504 Avon Street, LaCrosse, LaCrosse County, in the Western District of Wisconsin from 1996 to the present. The LaCrosse Chapter became an Outlaws Motorcycle Club chapter on or about February 15, 1997. The LaCrosse Chapter has elected officers and formal membership categories indicated by appropriate vestments.

12. The following defendants were members and/or associates of the Outlaws Motorcycle Club:

(a) Defendant Kevin P. O'Neill, a/k/a "Spike", was a member and president of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(b) Defendant Carl J. Warneke, a/k/a "Jay", was a member and president of the Chicago (Southside) Chapter of the Outlaws Motorcycle Club.

(c) Defendant Raymond L. Morgan, Jr., a/k/a "Shemp", was a member and president of the Gary Chapter of the Outlaws Motorcycle Club.

(d) Defendant Robert A. Kruppstadt, a/k/a "Clay", was a member and vice-president of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(e) Defendant Richard E. Mroch, a/k/a "Richie" was a member and vice-president of the Chicago (Southside) Chapter of the Outlaws Motorcycle Club.

(f) Defendant Randy M. Yager, a/k/a "Mad", was the regional president of the Chicago Region, and a member and president of the Gary Chapter of the Outlaws Motorcycle Club.

(g) Defendant William B. Brock, a/k/a "Bad Bill", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(h) Defendant James E. Hanson, a/k/a "Manson", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(I) Defendant Johnson F. Blake, a/k/a "Beeker", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(j) Defendant David A. Kadlec, a/k/a "Kid", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(k) Defendant Allen McVay, a/k/a "Big Al", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(l) Defendant James E. Meinen, Jr., a/k/a "LJ", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(m) Defendant Randall E. Miller, a/k/a "Madman", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(n) Defendant Harvey E. Powers, a/k/a "RV", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(o) Defendant James C. Rostron, a/k/a "Just Jim", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(p) Defendant James W. Schneider, a/k/a "Preacher", was a member of the Wisconsin Chapter of the Outlaws Motorcycle Club.

(q) Defendant Leslie John Jensen, a/k/a "Jack", was a member and president of the Lacrosse Chapter of the Outlaws Motorcycle Club.

III. Objects and Purposes

13. It was an object and purpose of the enterprise to enforce discipline among members of the outlaws Motorcycle Club by acts of violence.

14. It was an object and purpose of the enterprise to protect and defend territory considered to be within the control of the outlaws Motorcycle Club by acts of violence committed against members of rival motorcycle clubs.

15. It was an object and purpose of the enterprise to possess and traffic in controlled substances for the benefit of the Outlaws Motorcycle Club and its members.

16. It was an object and purpose of the enterprise to possess and traffick in stolen motor vehicles and motor vehicle parts for the benefit of the outlaws Motorcycle Club and its members.

17. It was an object and purpose of the enterprise to commit acts of robbery and burglary for the benefit of the outlaws Motorcycle Club and its members.

18. It was an object and purpose of the enterprise to possess and traffic in counterfeit United States currency for the benefit of the Outlaws Motorcycle Club and its members.

IV. Means and Methods

19. To accomplish some of the objects and purposes of the enterprise, the defendants and others known and unknown to the grand jury, used, among others, the following means and methods:

a. Acts involving the murder of rival gang members, particularly members of the Hell's Angels Motorcycle Club and other motorcycle clubs allied with the Hell's Angels. These acts also consisted of murders committed in the course of, and/or in the furtherance of robberies committed for the benefit of the enterprise.

b. Acts involving arson against the person and properties of rival gangs and their members, particularly the Hell's Angels Motorcycle Club and other motorcycle clubs allied with the Hell's Angels.

c. Acts involving robbery against rival gang members, particularly the Hell's Angels Motorcycle Club and other motorcycle clubs allied with the Hell's Angels. These acts also consisted of robberies committed for the benefit of the enterprise.

d. Acts of the felonious dealing in controlled substances, including cocaine and marijuana.

e. Acts of the transportation in interstate and foreign commerce of stolen motor vehicles, and the possession with the intent to sell or otherwise dispose of motor vehicles bearing a vehicle identification number which has been removed, obliterated, tampered with or altered.

f. Acts of the transportation in interstate commerce of stolen property.

g. Acts of the sale, purchase and passing of counterfeit United States currency.

20. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would possess, transport, and use firearms, silencers, explosives, explosive devices, and other deadly weapons, including but not limited to knives, and use violence and threats of violence to promote and conduct the affairs of the enterprise.

21. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would commit acts designed to intimidate owners, managers, employees, and customers of businesses frequented by members of rival gangs, particularly the Hell's Angels Motorcycle Club and other motorcycle clubs allied with the Hell's Angels.

22. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would assert that particular business and geographic locations were the exclusive territory of the Outlaws Motorcycle Club.

23. It was further part of the enterprise that the defendants and others known and unknown to the grand

jury would distribute quantities of controlled substances to each other and otherwise deal in controlled substances.

24. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would assert that the States of Wisconsin, Illinois and Indiana and parts of the State of New York, and elsewhere, was the territory of the Outlaws Motorcycle Club and that no other motorcycle clubs or organizations could operate or display "colors" within said territories without the consent of the Outlaws Motorcycle Club.

25. It was further part of the enterprise that the defendants would commit acts of violence, intimidation and threats against members and associates of other motorcycle clubs including, but not limited to, the Hell's Angels and other motorcycle clubs allied with the Hell's Angels.

26. It was further part of the enterprise that those defendants and other members known and unknown to the grand jury, who did not have felony convictions would possess firearms for the use of other defendants and members known and unknown to the grand jury who did have felony convictions.

27. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would possess and use and threaten the use of explosives and explosive devices to promote and conduct the affairs of the enterprise.

28. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would steal vehicles and sell the stolen motor vehicles

or otherwise use the stolen motor vehicles to promote and conduct the affairs of the enterprise.

29. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would and did acquire and possess law enforcement information regarding the Outlaws Motorcycle Club, and other motorcycle clubs, including information about members, associates, and activities, and information regarding the activities of law enforcement concerning the Outlaws Motorcycle Club and other motorcycle clubs.

30. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would and did utilize the United States mail, other private and commercial carriers, and wire communications to promote and conduct the affairs of the enterprise.

31. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would acquire, use and distribute counterfeit money to promote and conduct the affairs of the enterprise.

32. It was further part of the enterprise that the defendants and others known and unknown to the grand jury would and did misrepresent, conceal and hide, and caused to be misrepresented, concealed, and hidden, the purpose of the acts, and the acts, done in furtherance of the enterprise.

V. The Racketeering Violation

33. From on or about January 1, 1988, the exact date being unknown to the grand jury, and continuing to on or about June 10, 1997, in the Eastern District of Wisconsin and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Carl J. Warneke
a/k/a "Jay",
Raymond L. Morgan, Jr.
a/k/a "Shemp",
Robert A. Kruppstadt
a/k/a "Clay",
Richard E. Mroch
a/k/a "Richie",
Randy M. Yager
a/k/a "Mad",
Johnson F. Blake
a/k/a "Beeker",
William B. Brock
a/k/a "Bad Bill",
James E. Hanson
a/k/a "Manson",
David A. Kadlec
a/k/a "Kid",
Allen J. McVay
a/k/a "Big Al",
James E. Meinen, Jr.
a/k/a "LJ",
Randall E. Miller
a/k/a "Madman",
Harvey E. Powers
a/k/a "RV",
James C. Rostrom
a/k/a "Just Jim",
James W. Schneider
a/k/a "Preacher", and
Leslie John Jensen
a/k/a "Jack",

and others known and unknown, being persons employed by and associated with the enterprise, that is, the Chicago Region of the Outlaws Motorcycle Club, as described

above, which was an enterprise engaged in, and the activities of which affected, interstate and foreign commerce, knowing, willfully and unlawfully conducted and participated, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity, as those terms are defined in Title 18, United States Code, Sections 1961(1) and (5), to wit: through the commission of Racketeering Acts 1 through 34, as set forth below.

VI. The Pattern of Racketeering Activity

The pattern of racketeering activity as defined in Title 18, United States Code, Sections 1961(1) and (5), consisted of the following acts:

Racketeering Act # 1

The defendants below committed the following acts involving arson, any one of which alone constitutes the commission of racketeering act # 1:

a. On or about November 13, 1990, in Winnebago County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike", and
Randall E. Miller
a/k/a "Madman",

did by means of an explosive, knowingly damage, without consent, buildings and personal property having a value of $150.00 or more, in violation of Ch. 38, ¶¶ 20-1 and 5-1 (Chapter 720, Sections 5/20-1(a) and 5/5-1) of the Illinois Statutes.

b. On or about November 13, 1990, in Winnebago County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike", and
Randall E. Miller
a/k/a "Madman",

did by means of an explosive, knowingly damage, without consent, buildings and personal property having a value of $150.00 or more, and did injure as a result of the explosion, policemen present at the scene and acting in the line of duty, in violation of Ch. 38, ¶¶ 20-1, 20-1.1 and 5-1 (Chapter 720, Sections 5/20-1(a), 5/20-1.1(a)(3) and 5/5-1) of the Illinois Statutes.

Racketeering Act # 2

On or about August 24, 1992, in Racine County, in the Eastern District of Wisconsin, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
David A. Kadec
a/k/a "Kid", and
Randall E. Miller
a/k/a "Madman",

did commit an act involving murder, that is, with the intent to kill, did cause the death of Donald Wagner, a/k/a "Domino", a human being, in violation of Sections 940.01(1) and 939.05(1) of the Wisconsin Statutes.

Racketeering Act # 3

On or about January 30, 1993, in the Eastern District of Wisconsin and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Raymond L. Morgan, Jr.
a/k/a "Shemp",
Robert A. Kruppstadt
a/k/a "Clay",
Johnson F. Blake
a/k/a "Beeker",
James E. Meinen, Jr.
a/k/a "LJ",
Randall E. Miller
a/k/a "Madman", and
James W. Schneider
a/k/a "Preacher",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to kill members and associates of the Hell's Angels Motorcycle Club, and to effect the object of the conspiracy, one or more of said conspirators did travel to LaCrosse, Wisconsin in preparation for the intended killing(s), in violation of Sections 940.01(1), 939.31 and 939.05(1) of the Wisconsin Statutes.

Racketeering Act # 4

The defendants below committed the following acts involving murder, any one of which alone constitutes the commission of racketeering act # 4:

a. On or about April 7, 1993, in McHenry County, in the Northern District of Illinois, the defendants,

Randall E. Miller
a/k/a "Madman", and
James W. Schneider
a/k/a "Preacher",

did, without lawful justification, knowingly and intentionally kill Morris Gauger, a human being, while committing a forcible felony, to wit, robbery, in violation of Chapter 720, sections 5/9-1(a)(3) and 5/5-1 of the Illinois Statutes.

b. On or about April 7, 1993, in McHenry County, in the Northern District of Illinois, the defendants,

Randall E. Miller
a/k/a "Madman", and
James W. Schneider
a/k/a "Preacher",

did, without lawful justification, knowingly and intentionally kill Ruth Gauger, a human being, while committing a forcible felony, to wit, robbery, in violation of Chapter 720, Sections 5/9-1(a)(3) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 5

On or about August 5, 1993 in Rock County, in the Western District of Wisconsin, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Johnson F. Blake
a/k/a "Beeker",
William B. Brock
a/k/a "Bad Bill",

James E. Hanson
a/k/a "Manson",
Randall E. Miller
a/k/a "Madman", and
James W. Schneider,
a/k/a "Preacher",

did commit an act involving robbery, that is, with intent to steal, did take property from the person of the owner by the use of force against said person, intended to overcome said persons physical resistance to the taking and carrying away of the property, in violation of Sections 943.32(1)(a) and 939.05(1) of the Wisconsin Statutes.

Racketeering Act # 6

The defendants below committed the following acts, any one of which alone constitutes the commission of racketeering act # 6:

a. Between on or about October 1, 1993 and February 10, 1994, in Lake County, in the Northern District of Illinois and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Johnson F. Blake
a/k/a "Beeker",
Randall E. Miller
a/k/a "Madman", and
James W. Schneider,
a/k/a "Preacher",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to kill, without lawful justification, Edward

Murphy, and in furtherance thereof, one or more of said conspirators did commit, among others, the following overt acts: (1) On or about October 30, 1993, an explosive device was placed on a vehicle operated by Edward Murphy; (2) On February 10, 1994, Kevin P. O'Neill, Johnson F. Blake and Randall E. Miller, while in possession of a handgun, confronted Edward Murphy.

All in violation of Chapter 720, Sections 5/9-1(a), 5/8-2(a) and 5/5-1 of the Illinois Statutes.

b. On or about October 30, 1993, in Lake County, in the Northern district of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Johnson F. Blake
a/k/a "Beeker",
Randall E. Miller
a/k/a "Madman", and
James W. Schneider,
a/k/a "Preacher",

did commit an act involving arson, that is, by means of an explosive, did knowingly attempt to damage, without consent, personal property having a value of $150.00 or more, in violation of Chapter 720, Sections 5/20-1(a), 5/8-4(a) and 5/5-1 of the Illinois Statutes.

c. On or about October 30, 1993, in Lake County, in the Northern District of Illinois and elsewhere,

Kevin P. O'Neill
a/k/a "Spike",
Johnson F. Blake
a/k/a "Beeker",

Randall E. Miller
a/k/a "Madman", and
James W. Schneider,
a/k/a "Preacher",

did commit an act involving murder, that is, without lawful justification, did knowingly and intentionally attempt to kill Edward Murphy, a human being, in violation of Chapter 720, Sections 5/9-1(a)(1), 5/8-4(a) and 5/5-1 of the Illinois Statutes.

d. On or about February 10, 1994, in Lake County, in the Northern District of Illinois and elsewhere,

Kevin P. O'Neill
a/k/a "Spike",
Johnson F. Blake
a/k/a "Beeker",
Randall E. Miller
a/k/a "Madman",

did commit an act involving murder, that is, without lawful justification, did knowingly and intentionally attempt to kill Edward Murphy, a human being, in violation of Chapter 720, Sections 5/9-1(a)(1), 5/8-4(a) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 7

The defendants below committed the following acts, any one of which alone constitutes the commission of racketeering act # 7:

a. On or about December 15, 1993, in the District of Minnesota and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
David A. Kadlec
a/k/a "Kid", and
Randall E. Miller
a/k/a "Madman",

did travel in interstate commerce from the State of Wisconsin to the State of Minnesota, with the intent to promote, manage and carry on, or facilitate the promotion, management and carrying on or an unlawful activity, to wit, arson in violation of Section 609.562 of the Minnesota Statutes, and thereafter did perform and attempt to perform acts to promote, manage and carry on, and to facilitate the promotion, management, and carrying on of said unlawful activity in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

b. On or about December 15, 1993, in Minneapolis, in the District of Minnesota, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
David A. Kadlec
a/k/a "Kid", and
Randall E. Miller
a/k/a "Madman",

did commit an act involving arson, that is, by means of an explosive, did unlawfully and intentionally destroy and damage a building and personal property valued at more than $2,500.00, in violation of Sections 609.562 and 609.05 of the Minnesota Statutes.

c. On or about December 15, 1993, in Minneapolis, in the District of Minnesota, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
David A. Kadlec
a/k/a "Kid", and
Randall E. Miller
a/k/a "Madman",

did commit an act involving murder, that is, with the intent to effect the death of Patrick Matter, did attempt to cause the death of Patrick Matter, a human being, while committing arson, in violation of Sections 609.185(3), 609.562, 609.17 and 609.05 of the Minnesota Statutes.

Racketeering Act # 8

On or about March 19, 1994, in Cook County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Carl J. Warneke
a/k/a "Jay",
Raymond L. Morgan, Jr.
a/k/a "Shemp",
Robert A. Kruppstadt
a/k/a "Clay",
Richard E. Mroch
a/k/a "Richie",
Randy M. Yager
a/k/a "Mad",
Johnson F. Blake
a/k/a "Beeker",
William B. Brock
a/k/a "Bad Bill",
James E. Hanson
a/k/a "Manson",

Randall E. Miller
a/k/a "Madman", and
James W. Schneider
a/k/a "Preacher",

did commit an act involving robbery, that is, did take property, to wit, United States currency, from the person and presence of another by the use of force and by threatening the imminent use of force, in violation of Chapter 720, Sections 5/18-1(a) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 9

On or about June 14, 1994, in Winnebago County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay",
Richard E. Mroch
a/k/a "Richie",
William B. Brock
a/k/a "Bad Bill",
James E. Hanson
a/k/a "Manson",
Randall E. Miller
a/k/a "Madman",
Harvey E. Powers
a/k/a "RV",
James C. Rostron
a/k/a "Just Jim",
James W. Schneider
a/k/a "Preacher", and
Leslie John Jensen
a/k/a "Jack",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to kill, without lawful justification, members of the Hell's Henchmen Motorcycle Club, and in furtherance thereof, one or more of said defendants did travel to Winnebago County, Illinois, to confront members of the Hell's Henchmen Motorcycle Club, in violation of Chapter 720, Sections 5/9-1(a)(1), 5/8-2(a) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 10

On or about June 26, 1994, in Lake County, in the Northern District of Indiana, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay",
Richard E. Mroch
a/k/a "Richie",
Randy M. Yager
a/k/a "Mad",
Johnson F. Blake
a/k/a/ "Beeker",
David A. Kadlec
a/k/a "Kid",
James C. Rostron
a/k/a "Just Jim", and
James W. Schneider
a/k/a "Preacher",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to

the grand jury, to kill members of the Invaders Motorcycle Club, and in furtherance thereof, one or more of said defendants did travel to Lake County, Indiana, while armed with dangerous weapons, to confront members of the Invaders Motorcycle Club, in violation of Sections 35-42-1-1, 35-41-5-2 and 35-41-2-4 of the Indiana Statutes.

Racketeering Act # 11

The defendants below committed the following acts involving murder, any one of which alone constitutes the commission of racketeering act # 11:

a. Between on or about May 15, 1994 and June 28, 1994, in Winnebago County, in the Northern District of Illinois and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Allen McVay
a/k/a "Big Al",
Harvey E. Powers
a/k/a "RV", and
Leslie John Jensen
a/k/a "Jack",

did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to kill, without lawful justification, LaMonte Mathias, and in furtherance thereof, one or more of said conspirators did kill LaMonte Mathias, a human being, in violation of Chapter 720, Sections 5/9-1(a)(1), 5/8-2(a) and 5/5-1 of the Illinois Statutes.

b. On or about June 28, 1994, in Winnebago County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Allen McVay
a/k/a "Big Al", and
Harvey E. Powers
a/k/a "RV",

did, without lawful justification, knowingly and intentionally kill LaMonte Mathias, a human being, in violation of Chapter 720, Sections 5/9-1(a)(1) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 12

On or about July 12, 1994, in Lake County in the Northern District of Illinois, the defendants,

James E. Hanson
a/k/a "Manson", and
James C. Rostron
a/k/a "Just Jim",

did commit an act involving arson, that is, by means of fire, did knowingly attempt to damage, without consent, real property, in violation of Chapter 720, Sections 5/20-1(a), 5/8-4(a) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 13

On or about September 25, 1994, in the Western District of New York and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Carl J. Warneke
a/k/a "Jay",

Richard E. Mroch
a/k/a "Richie",
Randy M. Yager
a/k/a "Mad",
James E. Meinen, Jr.
a/k/a "LJ",
Randall E. Miller
a/k/a "Madman", and
Harvey E. Powers
a/k/a "RV",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury, to kill members of the Hell's Angels Motorcycle Club, and in furtherance thereof, one or more of said defendants did travel to Erie County, New York, while armed with dangerous weapons, to confront members of the Hell's Angels Motorcycle Club, in violation of Sections 125.25 and 105.15 of the Penal Laws of the State of New York.

Racketeering Act # 14

The defendants below committed the following acts, any one of which alone constitutes the commission of racketeering act # 14:

a. On or about October 12, 1994, in Winnebago County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay", and
Harvey E. Powers
a/k/a "RV",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to kill, without lawful justification, Roger Fiebrantz, and in furtherance thereof, one or more of said defendants did place an explosive device on a vehicle owned and operated by Roger Fiebrantz, in violation of Chapter 720, Sections 5/9-1(a)(1), 5/8-2(a) and 5/5-1 of the Illinois Statutes.

b. On or about October 12, 1994, in Winnebago County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay", and
Harvey E. Powers
a/k/a "RV",

did commit an act involving murder, that is, without lawful justification, did knowingly and intentionally attempt to kill Roger Fiebrantz, a human being, in violation of Chapter 720, Sections 5/9-1(a)(1), 5/8-4(a) and 5/5-1 of the Illinois Statutes.

c. On or about October 12, 1994, in Winnebago County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay", and
Harvey E. Powers
a/k/a "RV",

did commit an act involving arson, that is, by means of an explosive, did knowingly damage, without consent personal property having a value of $150.00 or more, in violation of Chapter 720, Sections 5/20-1(a) 5/5-1 of the Illinois Statutes.

Racketeering Act # 15

The defendants below committed the following acts, any one of which alone constitutes the commission of racketeering act # 15:

a. On or about November 7, 1994, in Winnebago County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Johnson F. Blake
a/k/a "Beeker", and
Harvey E. Powers
a/k/a "RV",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to kill, without lawful justification, Michael Coyne, and in furtherance thereof, one or more of said defendants did place an explosive device on a vehicle owned and operated by Michael Coyne, in violation of

Chapter 720, Sections 5/9-1(a), 5/8-2(a) and 5/5-1 of the Illinois Statutes.

b. On or about November 7, 1994, in Winnebago County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Johnson F. Blake
a/k/a "Beeker", and
Harvey E. Powers
a/k/a "RV",

did commit an act involving murder, that is, without lawful justification, did knowingly and intentionally attempt to kill Michael Coyne, a human being, in violation of Chapter 720, Sections 5/9-1(a)(1), 5/8-4(a) and 5/5-1 of the Illinois Statutes.

c. On or about November 7, 1994, in Winnebago County, in the Northern District of Illinois and elsewhere,

Kevin P. O'Neill
a/k/a "Spike",
Johnson F. Blake
a/k/a "Beeker", and
Harvey E. Powers
a/k/a "RV",

did commit an act involving arson, that is, by means of an explosive, did knowingly damage, without consent, personal property having a value of $150.00 or more, in violation of Chapter 720, Sections 5/20-1(a) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 16

The defendants below committed the following acts, any one of which alone constitutes the commission of racketeering act # 16:

a. On or about November 7, 1994, in Cook County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Raymond L. Morgan, Jr.
a/k/a "Shemp", and
William B. Brock
a/k/a "Bad Bill",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to commit murder, and in furtherance thereof, one or more of said defendants did place and detonate an explosive device, in violation of Chapter 720, Sections 5/9-1, 5/8-2(a) and 5/5-1 of the Illinois Statutes.

b. On or about November 7, 1994, in Cook County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Raymond L. Morgan, Jr.
a/k/a "Shemp", and
William B. Brock
a/k/a "Bad Bill",

did commit an act involving arson, that is, by means of an explosive, did knowingly damage, without consent, real property, in violation of Chapter 720, Sections 5/20-1(a) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 17

On or about December 16, 1994, in Cook County, in the Northern District of Illinois, the defendants,

Carl J. Warneke
a/k/a "Jay" and
Richard E. Mroch
a/k/a "Richie",

did commit an act involving arson, that is, did by means of fire, knowingly attempt to damage, without consent, real property, in violation of Chapter 720, Sections 5/20-1(a), 5/8-4(a) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 18

On or about December 19, 1994, in the Eastern District of Wisconsin, the defendants,

Kevin P. O'Neill
a/k/a "Spike", and
Randall E. Miller
a/k/a "Madman",

did unlawfully transport in interstate commerce from the State of Illinois to the State of Wisconsin, United States currency of a value of $5,000 or more, knowing the same to have been stolen, in violation of Title 18, United States Code, Sections 2314 and 2.

Racketeering Act # 19

Between on or about December 1, 1994 and February 1, 1995, in Racine County, in the Eastern District of Wisconsin and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay",
Harvey E. Powers
a/k/a "RV", and
James E. Hanson
a/k/a "Manson",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to kill Anthony Baschetti, and in furtherance thereof, one or more of said conspirators did surveil Anthony Baschetti in preparation for the intended killing, in violation of Sections 940.01(1), 939.31 and 939.05(1) of the Wisconsin Statutes.

Racketeering Act # 20

The defendants below committed the following acts involving murder, any one of which alone constitutes the commission of racketeering act # 20:

a. Between on or about February 1, 1995 and March 6, 1995, in Cook County, in the Northern District of Illinois and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike", and
Carl J. Warneke
a/k/a "Jay",

did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to kill, without lawful justification, Jack Castle, and in furtherance

thereof, one or more of said conspirators did surveil the activities of Jack Castle in preparation for the intended killing, in violation of Chapter 720, Sections 5/9-1(a)(1), 5/8-2(a) and 5/5-1 of the Illinois Statutes.

b. On or about March 3, 1995, in Cook County, in the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike", and
Carl J. Warneke
a/k/a "Jay",

did, without lawful justification, knowingly and intentionally kill Jack Castle, a human being, in violation of Chapter 720, Sections 5/9-1(a) and 5/5-1 of the Illinois Statutes.

Racketeering Act # 21

Between on or about March 1, 1995 and April 25, 1995, in Racine County, in the Eastern District of Wisconsin and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay",
Harvey E. Powers
a/k/a "RV", and
Leslie John Jensen
a/k/a "Jack",

did commit an act involving murder, that is, did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury to kill Jerry Bokina, and in furtherance thereof, one or more of said conspirators did surveil the

activities of Jerry Bokina in preparation for the intended killing, in violation of Sections 940.01(1), 939.31 and 939.05(1) of the Wisconsin Statutes.

Racketeering Act # 22

On or about April 6, 1995, in Kenosha County, in the Eastern District of Wisconsin, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay", and
James E. Meinen, Jr.
a/k/a "LJ",

did commit an act involving robbery, that is, did, with intent to steal, attempt to take property from the person or presence of the owner by the use of force against said person, intended to overcome said person's physical resistance to the taking and carrying away of the property, in violation of Sections 943.32(1)(a), 939.32 and 939.05(1) of the Wisconsin Statutes.

Racketeering Act # 23

Between on or about January 1, 1989 and continuing to on or about June 10, 1997, in the Eastern District of Wisconsin and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay",
Richard E. Mroch
a/k/a "Richie",

Johnson F. Blake
a/k/a "Beeker",
Allen J. McVay
a/k/a "Big Al",
James E. Meinen, Jr.
a/k/a "LJ",
Randall E. Miller
a/k/a "Madman",
Harvey E. Powers
a/k/a "RV", and
James W. Schneider
a/k/a "Preacher",

did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury, to possess with intent to distribute and to distribute cocaine, a controlled substance, contrary to the provisions of Title 21, United States Code, Section 841(a)(1), and in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

Racketeering Act # 24

Between on or about January 1, 1994 and continuing to on or about February 29, 1996, in the Eastern District of Wisconsin and elsewhere, the defendants,

James E. Meinen, Jr.
a/k/a "LJ", and
Randall E. Miller
a/k/a "Madman",

did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury, to possess with intent to distribute and to distribute hydrocodone, a

controlled substance, contrary to the provisions of Title 21, United States Code, Section 841(a)(1), and in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

Racketeering Act # 25

In or about February, 1992, in the Eastern District of Wisconsin, the defendants,

Randall E. Miller
a/k/a "Madman",

did, with intent to defraud, pass, utter and publish, falsely made, forged and counterfeited obligations of the United States, that is, Federal Reserve Notes of denominations totaling approximately $100,000.00, which they then knew to be falsely made, forged and counterfeited, in violation of Title 18, United States Code, Sections 472 and 2.

Racketeering Act # 26

In or about July, 1993, in the Eastern District of Wisconsin, the defendants,

Raymond L. Morgan, Jr.
a/k/a "Shemp",

did knowingly buy and receive false, forged and counterfeited obligations of the United States, that is, Federal Reserve Notes of denominations totaling approximately $100,000.00, with the intent that the same be passed, published or used as true and genuine, in violation of Title 18, United States Code, Sections 473 and 2.

Racketeering Act # 27

In or about January, 1995, in the Western District of Wisconsin, the defendants,

Harvey E. Powers
a/k/a "RV",

did, with intent to defraud, possess falsely made, forged and counterfeited obligations of the United States, that is, Federal Reserve Notes of denominations totaling approximately $17,000.00 which he knew to be falsely made, forged and counterfeited, in violation of Title 18, United States Code, Sections 472 and 2.

Racketeering Act # 28

On or about September 18, 1991, in the Northern District of Illinois, the defendant.

William B. Brock
a/k/a "Bad Bill",

did unlawfully transport in interstate and foreign commerce stolen motor vehicles, that is, a 1990 Harley Davidson motorcycle, VIN # 1HD1DJL1XLY511271 and a 1990 Harley Davidson motorcycle, VIN # 1HD1FAL18LY508041, from the State of Illinois and the United States of America, to Germany, knowing said motor vehicles to be stolen, in violation of Title 18, United States Code, Sections 2312 and 2.

Racketeering Act # 29

On or about May 13, 1992, in the Northern District of Illinois, the defendant,

William B. Brock
a/k/a "Bad Bill",

did unlawfully transport in interstate and foreign commerce a stolen motor vehicle, that is, a 1991 Harley Davidson motorcycle, VIN # 1HD1EBL12MY128056, from the State of Illinois and the United States of America, to Germany, knowing the same to be stolen, in violation of Title 18, United States Code, Sections 2312 and 2.

Racketeering Act # 30

On or about October 7, 1992, in the Northern District of Illinois, the defendant,

William B. Brock
a/k/a "Bad Bill",

did unlawfully transport in interstate and foreign commerce a stolen motor vehicle, that is, a 1992 Harley Davidson motorcycle, VIN # 1HD1BML13NY028750, from the State of Illinois and the United States of America, to Germany, knowing the same to be stolen, in violation of Title 18, United States Code, Sections 2312 and 2.

Racketeering Act # 31

On or about October 20, 1994, in the Northern District of Illinois, the defendant,

William B. Brock
a/k/a "Bad Bill",

did knowingly possess with intent to sell and otherwise dispose of a motor vehicle, that is, a 1990 Nissan Sentra, VIN # 1N4GB22B9LC736592, knowing that the vehicle identification number (VIN) of said vehicle had been

unlawfully removed, obliterated, tampered with and altered, in violation of Title 18, United States Code, Section 2321 and 2.

Racketeering Act # 32

On or about December 2, 1994, in the Northern District of Illinois, the defendant,

William B. Brock
a/k/a "Bad Bill",

did knowingly possess with intent to sell and otherwise dispose of a motor vehicle, that is, a 1988 Ford Crown Victoria, VIN # 2FABP74F9JX135305, knowing that the vehicle identification number (VIN) of said vehicle had been unlawfully removed, obliterated, tampered with and altered, in violation of Title 18, United States Code, Section 2321 and 2.

Racketeering Act # 33

On or about December 15, 1994, in the Northern District of Illinois, the defendant,

William B. Brock
a/k/a "Bad Bill",

did knowingly possess with intent to sell and otherwise dispose of a motor vehicle, that is, a 1989 Ford Crown Victoria, VIN # 2FABP74F9KX109059, knowing that the vehicle identification number (VIN) of said vehicle had been unlawfully removed, obliterated, tampered with and altered, in violation of Title 18, United States Code, Section 2321 and 2.

Racketeering Act # 34

On or about January 30, 1995, in the Eastern District of Wisconsin, the defendant,

Kevin F. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay", and
Harvey E. Powers
a/k/a "RV",

did knowingly possess with intent to sell and otherwise dispose of a motor vehicle, that is, a 1949 Harley Davidson motorcycle, VIN # 49FL7206, knowing that the vehicle identification number (VIN) of said vehicle had been unlawfully removed, obliterated, tampered with and altered, in violation of Title 18, United States Code, Section 2321 and 2.

All in violation of Title 18, United States Code, Section 1962(c).

Count Two

I. Introduction

1. The paragraphs of Sections I, II, III and IV, of Count One are realleged and incorporated by reference as though fully set forth herein.

II. The Racketeering Conspiracy

2. From on or about January 1, 1988, the exact date being unknown to the grand jury, and continuing to on or about June 10, 1997, in the Eastern District of Wisconsin and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Carl J. Warneke
a/k/a "Jay",
Raymond L. Morgan, Jr.
a/k/a "Shemp",
Robert A. Kruppstadt
a/k/a "Clay",
Richard E. Kroch
a/k/a "Richie",
Randy M. Yager
a/k/a "Mad",
Johnson F. Blake
a/k/a "Beeker",
William B. Brock
a/k/a "Bad Bill",
James E. Hanson
a/k/a "Manson",
David A. Kadlec
a/k/a "Kid",
Allen J. McVay
a/k/a "Big Al",
James E. Meinen, Jr.
a/k/a "LJ",
Randall E. Miller
a/k/a "Madman",
Harvey E. Powers
a/k/a "RV",
James C. Rostron
a/k/a "Just Jim",
James W. Schneider
a/k/a "Preacher", and
Leslie John Jensen
a/k/a "Jack",

being persons employed by and associated with the enterprise described in Section II of Count One, that is, the Chicago Region of Outlaws Motorcycle Club, knowingly,

willfully and unlawfully did combine, conspire, confederate, and agree among themselves and with others known and unknown to the grand jury, to commit an offense against the United States, to wit: to violate Title 18, United States Code, Section 1962(c), that is to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise, which was engaged in, and the activities of which affected, interstate and foreign commerce, through a pattern of racketeering activity, as those terms are defined in Title 18, United States Code, Sections 1961(1) and (5). The pattern of racketeering activity through which the defendants agreed to conduct the affairs of the enterprise, consisted of the acts set forth in Section VI of Count One of this indictment, which are realleged and incorporated by reference as though fully set forth herein.

3. It was further part of the conspiracy that the defendants agreed that a conspirator would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise.

All in violation of Title 18, United States Code, Section 1962(d).

Count Three

Between on or about January 1, 1989 and continuing to on or about June 10, 1997, in the Eastern District of Wisconsin and elsewhere, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay",

Richard E. Mroch
a/k/a "Richie",
Johnson F. Blake
a/k/a "Beeker",
Allen J. McVay
a/k/a "Big Al",
James E. Meinen, Jr.
a/k/a "LJ",
Randall E. Miller
a/k/a "Madman",
Harvey E. Powers
a/k/a "RV", and
James W. Schneider
a/k/a "Preacher",

did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others known and unknown to the grand jury, to possess with intent to distribute and to distribute cocaine, a controlled substance, contrary to the provisions of Title 21, United States Code, Section 841(a)(1), and in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

Count Four

Between on or about January 1, 1994 and continuing to on or about February 28, 1996, in the Eastern District of Wisconsin and elsewhere, the defendants,

James E. Meinen, Jr.
a/k/a "LJ", and
Randall E. Miller
a/k/a "Madman",

did knowingly and intentionally combine, conspire, confederate and agree among themselves and with others

known and unknown to the grand jury, to possess with intent to distribute and to distribute hydrocodone, a controlled substance, contrary to the provisions of Title 21, United States Code, Section 841(a)(1), and in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

Count Five

1. At all times material to this indictment, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay", and
James W. Schneider
a/k/a "Preacher",

together with other persons known and unknown to the grand jury, were members of the Chicago Region of the Outlaws Motorcycle Club which constituted an enterprise as defined in Title 18, United States Code, Section 1959(b)(2), that is, a group of individuals associated in fact which was engaged in, and the activities of which affected, interstate and foreign commerce.

2. From on or about January 1, 1988, the exact date being unknown to the grand jury, and continuing to on or about June 10, 1997, the above-described enterprise and its members and associates engaged in the acts of racketeering activity as defined in Title 18, United States Code Section 1961(1) and (5), which are set forth in Section VI of Count One of this indictment and which are realleged and incorporated by reference as though fully set forth herein.

3. In or about January, 1993, in Racine County, in the Eastern District of Wisconsin, for the purpose of maintaining and increasing their position in the enterprise described in paragraph 1 above, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay", and
James W. Schneider
a/k/a "Preacher",

and others known and unknown to the grand jury, unlawfully, willfully and knowingly did assault with a dangerous weapon, members of the Brotherhood Motorcycle Club, in violation of Sections 940.19, 939.63, 941.30, and 939.05.

All in violation of Title 18, United States Code, Section 1959(a)(3).

Count Six

On or about October 12, 1994, in the Eastern District of Wisconsin and the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/ka/ "Spike",
Robert A. Kruppstadt
a/k/a "Clay", and
Harvey E. Powers
a/k/a "RV",

did knowingly transport, in interstate commerce, an explosive with the knowledge and intent that it would be used to kill, injure, and intimidate Roger Fiebrantz or any other individual, and unlawfully damage and destroy a

vehicle and other real and personal property, and which did directly result in personal injury to Roger Fiebrantz, in violation of Title 18, United States Code, Section 844(d).

Count Seven

On or about November 5, 1994, in the Eastern District of Wisconsin and the Northern District of Illinois, the defendants,

Kevin P. O'Neill
a/k/a "Spike",
Robert A. Kruppstadt
a/k/a "Clay",
Johnson F. Blake
a/k/a "Beeker", and
Harvey E. Powers
a/k/a "RV",

did knowingly transport, in interstate commerce, an explosive with the knowledge and intent that it would be used to kill, injure and intimidate Michael Coyne or any other individual, and unlawfully damage and destroy a vehicle and other real and personal property, in violation of Title 18, United States Code, Section 844(d).

RICO Forfeiture Allegations

1. The allegations of Counts One and Two of the Indictment are hereby realleged and incorporated by reference as though fully set forth herein for the purpose of alleging forfeitures, pursuant to the provisions of Title 18, United States Code, Section 1963.

2. The defendants,

Kevin P. O'Neill
a/k/a "Spike",
Carl J. Warneke
a/k/a "Jay",
Raymond L. Morgan, Jr.
a/k/a "Shemp",
Robert A. Kruppstadt
a/k/a "Clay",
Richard E. Kroch
a/k/a "Richie",
Randy M. Yager
a/k/a "Mad",
Johnson F. Blake
a/k/a "Beeker",
William B. Brock
a/k/a "Bad Bill",
James E. Hanson
a/k/a "Manson",
David A. Kadlec
a/k/a "Kid",
Allen J. McVay
a/k/a "Big Al"
James E. Meinen, Jr.
a/k/a "LJ",
Randall E. Miller
a/k/a "Madman",
Harvey E. Powers
a/k/a "RV",
James C. Rostron
a/k/a "Just Jim",
James W. Schneider
a/k/a "Preacher", and
Leslie John Jensen
a/k/a "Jack",

a. have acquired and maintained interests in violation of Title 18, United States Code, Section 1962, which interests, in whatever forms, wherever located, and in whatever names held, are therefore subject to forfeiture to the United States of America, pursuant to Title 18, United States Code, Section 1963(a)(1);

b. have an interest in, security of, claims against and property and contractual rights affording a source of influence over the enterprise named and described herein, which the defendants established, operated, controlled, conducted, and participated in the conduct of, in violation of Title 18, United States Code, Section 1962, which interests, securities, claims, and property and contractual rights, in whatever names held, in whatever form, and wherever located, are subject to forfeiture to the United States of America, pursuant to Title 18, United States Code, Section 1963(a)(2);

c. have property consisting and derived from proceeds which the defendants obtained, directly and indirectly, from racketeering activity in violation of Title 18, United States Code, Section 1962, which property, in whatever form, wherever located, and in whatever names held, is subject to forfeiture to the United States of America, pursuant to Title 18, United States Code, Section 1963(a)(3).

3. The interests subject to forfeiture to the United States of America, pursuant to paragraphs 1 and 2 above, include but are not limited to the following:

a. The property located at 1263 South Cherry Street, Janesville, Wisconsin, including all land, buildings, fixtures, and chattels known as the Clubhouse.

b. The property located at 1835-9 South 2nd Street, Milwaukee, Wisconsin, including all land, buildings, fixtures, and chattels known as the Clubhouse.

c. The property located at 2601-03 West 25th Street, Chicago, Illinois, including all land, buildings, fixtures, and chattels known as the Clubhouse.

d. The property located at 3745 Division Street, Chicago, Illinois, including all land, buildings, fixtures, and chattels known as the Clubhouse.

e. The property located at 1917 E. Washington Street, Joliet, Illinois, including all land, buildings, fixtures, and chattels known as the Clubhouse.

f. The property located at 3265 Carolina Street, Gary, Indiana, including all land, buildings, fixtures, and chattels known as the Clubhouse.

g. The property located at 504 Avon Street, La-Crosse, Wisconsin, including all land, buildings, fixtures, and chattels known as the Clubhouse.

h. An assembled motorcycle, consisting of a Tripoli brand frame, Delkron brand engine cases and miscellaneous parts, registered with the State of Wisconsin as a 1995 Replica, Title # 952491CO14-6 and VIN # 2T91FEL49NR 097026.

4. If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty,

it is the intent of the United States, pursuant to Title 18, United States Code, Section 1963(m), to seek forfeiture of any other property of said defendants up to the value of the above forfeitable property. The above-named defendants, and each of them, are jointly and severely liable for the forfeiture obligations as alleged above.

All pursuant to Title 18, United States Code, Section 1963.

A TRUE BILL:

/s/ James Schultz
FOREPERSON
Dated:

/s/ Barbara B. Berman for
THOMAS P. SCHNEIDER
United States Attorney